A COMPILATION OF THE CANADIAN COPYRIGHT CASES DECIDED IN 2014

LAURENT CARRIÈRE*
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LAWYERS, PATENT & TRADEMARK AGENTS

First, a general listing:

1. *Ahern v. 1772887 Ontario Ltd. (Mariage Québec),* 2014 QCCQ 973, http://canlii.ca/fr/qc/qccq/doc/2014/2014qccq973/2014qccq973.html (Que. Ct.; 2014-02-05)
2. *Animal Welfare International Inc. v. W3 International Media Ltd.,* 2014 CarswellBC 2902, 2014 BCSC 1839, [2014] B.C.W.L.D. 7532, [2014] B.C.W.L.D. 7535, [2014] B.C.W.L.D. 7628, 246 A.C.W.S. (3d) 734, [2014] B.C.J. 2442, http://www.canlii.org/en/bc/bcsc/doc/2014/2014bcsc1839/2014bcsc1839.html (B.C.S.C.; 2014-10-01)
3. *Atlantic Canada Regional Council of Carpenters, Millwrights, and Allied Workers v. Maritime Environmental Training Institute Ltd.,* 2014 CarswellNS 125, 2014 NSSC 64, 237 A.C.W.S. (3d) 746, 1081 A.P.R. 1, 341 N.S.R. (2d) 1, [2014] N.S.J. 75, http://www.canlii.org/en/ns/nssc/doc/2014/2014nssc64/2014nssc64.html (S.C. N.S.; 2014-02-20)
4. *Bank of Montreal v. Rogozinsky**, 2014 CarswellAlta 2321, 248 A.C.W.S. (3d) 96, 2014 ABQB 771, [2014] A.J. 1422, http://www.canlii.org/en/ab/abqb/doc/2014/2014abqb771/2014abqb771.html (Alta Q.B.; 2014-12-16)
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6. *Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC) v. National Gallery of Canada (NGC),* 2012 CarswellNat 4332 (C.A.P.P.R.T.; 2012-02-16) reversed 2013 CarswellNat 507 (F.C.A.;

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7. *Canadian Association of Film Distributors and Exporters v. Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) Inc*., 2014 CarswellNat 4094, 2014 FCA 235, 246 A.C.W.S. (3d) 439, 378 D.L.R. (4th) 742, http://www.canlii.org/en/ca/fca/doc/2014/2014fca235/2014fca235.html (F.C.A.; 2014-10-20)

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(Ont. Sup. Ct.; 2014-02-04)

69. *Vanasse v. Éditions du Grand Duc, une division de Groupe Éducalivres inc.*, 2014 CarswellQue 8497; 2014 QCCQ 7020; J.E. 2014-1660; EYB 2014-241110, http://www.canlii.org/fr/qc/qccq/doc/2014/2014qccq7020/2014qccq7020.html (Que. Sup. Ct.; 2014-07-2)
70. *Van Helden v. R.*,* 2014 CarswellNat 1977; 2014 TCC 196; 2014 DTC 1156; 242 ACWS (3d) 742, https://www.canlii.org/en/ca/tcc/doc/2007/2007tcc632/2007tcc632.html (TCC; 2014-06-13)
71. *Victoria's Secret Stores Brand Management, Inc. v. Thomas Pink Limited*,* 2014 CarswellNat 84, 2014 FC 76, 117 C.P.R. (4th) 83, 237 A.C.W.S. (3d) 201, http://www.canlii.org/en/ca/fct/doc/2014/2014fc76/2014fc76.html (F.C.; 2014-01-22)
72. *Voltage Pictures v. Doe,* 119 C.P.R. (4th) 232, 2014 CarswellNat 1599, 2014 FC 161, 240 A.C.W.S. (3d) 964, [2014] F.C.J. 492, http://www.canlii.org/en/ca/fct/doc/2014/2014fc161/2014fc161.html (F.C.; 2014-02-20)
73. *Waldman v. Thomson Reuters Canada Limited,* 120 C.P.R. (4th) 127, 238 A.C.W.S. (3d) 303, 56 C.P.C. (7th) 81, 2014 CarswellOnt 2674, 2014 ONSC 1288, 238 A.C.W.S. (3d) 303, [2014] O.J. 1049, http://canlii.ca/en/on/onsc/doc/2014/2014onsc1288/2014onsc1288.html (Ont. Sup. Ct.; 2014-03-04)
74. *Wanless v. Mayfair Music Publications Inc.*, 2014 CarswellOnt 12291, 2014 ONSC 4806, 244 A.C.W.S. (3d) 817, [2014] O.J. 4179, http://www.canlii.org/en/on/onsc/doc/2014/2014onsc4806/2014onsc4806.html (Ont. Sup. Ct.; 2014-09-08)

Now, a section by section analysis of those 2014 Canadian cases.

- **Section 1 – Short title**

There is a presumption that statutes are not in conflict.

Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC)) v. National Gallery of Canada (NGC), 121 C.P.R. (4th) 1 (S.C.C. 2014-05-14) Rothstein J. [reversing 2013 CarswellNat 507 (F.C.A.; 2013-03-04); reversing 2012 CarswellNat 4332 (C.A.P.P.R.T.; 2012-02-16)]

> [21] In drafting the *SAA* [*Status of the Artist Act*, S.C. 1992, c. 33], Parliament is presumed to have knowledge of the *Copyright Act* and to have intended that the two statutes not conflict (R. Sullivan,

> *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 205 and 325). The *SAA*'s explicit reference to the *Copyright Act* in s. 6(2)(*b*)(i) supports that presumption. In the absence of evidence of conflict or that one of these laws is intended to provide an exhaustive declaration of the applicable law, the two statutes must be read together in a manner that allows them to work in a complementary fashion.

- **Section 2 – Definition of "architectural work"**

Even if qualified as an "architectural design" a business sytem using computer is not a building or structure and, therefore, not an "architectural work"

J. v. M., 117 C.P.R. (4th) 409 (BC SC; 2014-01-23) Bunyeat J.

> [60] While the Amended Notice of Civil Claim describes the "Work" as an "architectural design", it is clear that the "Work" does not meet the definition of "architectural work". It is not a building or structure or model thereof. At best, the Plaintiff and her team implemented an idea as to how to reshape the nature of the order tracking and shipping system that was in place at SCMI.

- **Section 2 – Definition of "Board"**

The content of the duty of fairness is variable.
Re: Sound v. Fitness Industry Council of Canada, 120 C.P.R. (4th) 287 (F.C.A.; 2014-02-24) Evans J.

> [34] The black-letter rule is that courts review allegations of procedural unfairness by administrative decision-makers on a standard of correctness: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43.
>
> [35] Courts give no deference to decision-makers when the issue is whether the duty of fairness applies in given administrative and legal contexts. This is evident from the discussion in *Dunsmuir v. New Brunswick*, 2008 SCC 9; [2008] 1 S.C.R. 190 at paras. 77 *et seq*. (*Dunsmuir*) of whether David Dunsmuir was entitled to procedural fairness before his employment in the provincial public service was terminated.

> [36] However, the standard of review applicable to an allegation of procedural unfairness concerning the content of the duty in a particular context, and whether it has been breached, is more nuanced. The content of the duty of fairness is variable because it applies to a wide range of administrative action, actors, statutory regimes, and public programs, with differing impacts on individuals. Flexibility is necessary to ensure that individuals can participate in a meaningful way in the administrative process and that public bodies are not subject to procedural obligations that would prejudice the public interest in effective and efficient public decision-making.

- **Section 2 – definition of "Board"**

Parliament intended the Board to have primary jurisdiction over the collective enforcement of neighbouring rights, including the interpretation of the statutory provisions governing this complex, rate-setting scheme.

Re: Sound v. Fitness Industry Council of Canada, 120 C.P.R. (4th) 287 (F.C.A.; 2014-02-24) Evans J.

> [44] The substantive legal question in dispute in the present application is whether the *Copyright Act* entitles a collective society to a tariff calculated on the basis of all the sound recordings eligible for equitable remuneration that are used to accompany particular activities, or only those in respect of which makers or performers have authorized the society to act on their behalf. This is a question of statutory interpretation because it is not limited to the facts of this case.
>
> [45] Re:Sound contends that the presumption that reasonableness is the standard for reviewing an administrative tribunal's interpretation of its enabling legislation is rebutted when the Board is interpreting the Act: *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283 (*Rogers*).Writing for the majority in that case, Justice Rothstein stated (at para. 14):
>
> > It would be inconsistent for the court to review a legal question on judicial review of a decision of the Board on a deferential standard and decide exactly the same legal question *de novo* if it arose in an infringement action in the court at first instance. It would be equally inconsistent if on appeal from a judicial review, the appeal court were to approach a legal question decided by the Board on a deferential standard, but adopt a correctness standard on an appeal from a decision of a court at first instance on the same legal question.

[46] In my view, *Rogers* is distinguishable because the question of statutory interpretation in dispute in the present case arises from the Board's approval of a proposed royalty under subsection 68(3) of the *Copyright Act*. Determining whether a collective society represents eligible recordings not in its repertoire when proposing a tariff under section 67.1 is not within a statutorily created "shared primary jurisdiction between the administrative tribunal and the courts": *Rogers* at para. 18.

[47] This conclusion does not rest on a finding that there are *no* circumstances under which a court could be required to determine at first instance whether a collective society represented all eligible recordings used to accompany particular activities, or only those that had been brought into its repertoire as a result of some form of authorization from the performer or maker.

[48] For example, while a collective society that has failed to file a tariff may not bring an action to recover equitable remuneration from a user, it can do so with the written consent of the Minister of Industry: subsection 67.1(4). A user of a recording of music sued in such an action might seek to reduce the amount claimed by the collective society, on the ground that the society may only collect royalties in respect of recordings for which their makers or performers have authorized it to act for them.

[49] In my view, this theoretical and somewhat remote possibility is not sufficient to bring the present case within the *Rogers* exception. The requirement of Ministerial consent before a society can bring an action to recover equitable remuneration instead of seeking the Board's approval of a tariff is a clear indication that Parliament intended the Board to have primary jurisdiction over the collective enforcement of neighbouring rights, including the interpretation of the statutory provisions governing this complex, rate-setting scheme. No such provision limited the copyright holder's right in *Rogers* to bring an infringement action that could have required a court to decide the same legal question as that decided by the Board.

[50] Courts have long been familiar with the individual law of copyright through their jurisdiction over infringement actions. However, they have no similar knowledge of the statutory scheme for the collective administration of the right to equitable remuneration, a complex and technical matter that the Act entrusts almost exclusively to the Board: compare *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424, 247 D.L.R. (4th) 103 at para. 110.

- **Section 2 – Definition of "collective society"**

Collective societies must either operate a licensing scheme for a repertoire or collect and distribute royalties payable under the *Copyright Act.*

Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC) v. National Gallery of Canada (NGC), 121 C.P.R. (4th) 1 (S.C.C. 2014-05-14) Rothstein J. [reversing 2013 CarswellNat 507 (F.C.A.; 2013-03-04), which was reversing 2012 CarswellNat 4332 (C.A.P.P.R.T.; 2012-02-16)]

> [3] The *Copyright Act* contains several provisions that are relevant to the present appeal. Section 2 defines a "collective society" (sometimes referred to as a "copyright collective") as a society, association or corporation that carries on the business of collective administration of copyright for the benefit of artists (among others) who assign, grant a licence, or otherwise authorize the society to act on their behalf with respect to their copyrights so assigned or authorized. Collective societies must either operate a licensing scheme for a repertoire of artists' works whereby the society determines the conditions under which it will authorize the use of such works, or collect and distribute royalties payable under the *Copyright Act* by users of such works. […]
>
> [13] […] Finally, all parties, interveners and the Tribunal do not dispute that scale agreements under the *SAA* do not apply to collective societies governed by the *Copyright Act*.

- **Section 2 – Definition of "compilation**

To attract copyright protection a compilation must also be original.

Denturist Group of Ontario v. Denturist Association of Canada, 2014 CarswellNat 4191 (F.C.; 2014-10-16) Manson J.

> [65] A compilation can qualify for copyright protection so long as the author uses skill and judgment in the relevant sense in determining the arrangement of the work (*Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed.Fox, at 7-16.1). If information has been arranged according to industry standards, the amount of skill, judgment, or labour exercised is minimal and does not meet the threshold of originality required (*Tele-Direct (Publications) Inc v*

> *American Business Information Inc*, (1997), 1997 CanLII 6378 (FCA), 154 DLR (4th) 328 (FCA)).

- **Section 2 – Definition of "computer program"**

A web site could attract copyright protection.

Tremblay v. Plourde, [2014] J.Q. 419 (Que. Sup. Ct.; 2014-01-15) Dallaire J.

> [266] Au paragraphe 54, la demanderesse réclame 20 000 $. Il est en preuve que le défendeur, pour construire son site, a pigé en bonne partie ses textes à partir de la page web, propriété de la demanderesse. Ce n'est pas nié.
>
> [267] Cette page web couverte en vertu de la *Loi sur le droit d'auteur* est la propriété de la demanderesse.
>
> [268] En effet, la *Loi sur le droit d'auteur* prévoit à son article 2 que le programme d'ordinateur est une œuvre littéraire [Fn 12 *Loi sur le droit d'auteur,* LRC 1985, c C-42.].

- **Section 2 – Definition of "computer program"**

Originality is not a matter of quantity.

Planification-Organisation-Publications Systèmes (POPS) Ltée v. 9054-8181 Québec Inc., 124 C.P.R. (4th) 161 (FCA; 2014-07-25) Gauthier J. [varying 111 C.P.R. (4th) 1, (FC; 2013-04-25)]

> [79] I note that the originality of a work is not measured by the number of lines. […]

- **Section 2 – Definition of "copyright"**

Copyright is an intangible.

London Life Insurance Company v. Canada, 2014 CarswellNat 1276 (F.C.A.; 2014-04-29) Gauthier J.

> [56] Incorporeal rights should not be confused with physical media. For example, copyright in a work is not seized by seizing the book itself.

- **Section 2 – Definition of "educational institution"**

Private instructor does not qualify as an educational institution

Van Helden v. R.,* 2014 CarswellNat 1977 (T.C.C.; 2014-06-13) Miller J.

> [16] I agree with his comments [*Kam v R.,* [2013] DTC 1218 (TCC) Favreau J. at para. 23]. A review of the debates which took place in the House of Commons when the predecessor to subsection 118.5(1) was first proposed confirms that the term 'educational institution' was not intended to apply to situations as in the present appeal.

[20] In conclusion, the original intent of the tuition credit was to make post secondary education more accessible to students by lessening their financial burden. Although subsection 118.5(1) [of the *Income Tax Act*] should be interpreted broadly, it is clear that Parliament did not intend that the provision should apply to fees which students paid for private piano lessons at an instructor's home.

- **Section 2 – Definition of "every original work…"**

He who creates is the author.

Flansberry (Kapture Design) v. 6548890 Canada inc. (Turbo Marketing), 2014 CarswellQue 11833 (Que. Ct.; 2014-06-01) Lapointe J.

> [71] Or, il arrive que celui qui confectionne un certain travail, en l'occurrence une œuvre artistique, n'en soit pas pour autant l'auteur au sens de l'article 3 de la Loi qui dresse l'état des droits d'auteur et des droits moraux sur les œuvres. Pour ne prendre qu'un seul exemple, le sténographe qui note le mot à mot des propos tenus par une autre personne, n'aurait pas la titularité du droit d'auteur sur le texte lequel reviendrait à la personne ayant dicté le texte. (Voir à cet égard l'analyse de Me Stéphane Gilker, « Principes généraux du droit d'auteur », conférence donnée au Congrès annuel du Barreau du Québec (2009) paragr. 3.4.1).
>
> [73] Et, l'ensemble de la preuve permet de conclure qu'en aucun temps la demanderesse reconventionnelle ou ses représentants n'ont été à l'origine des œuvres à un point tel et avec une précision telle que le rôle du graphiste était réduit à concrétiser ses suggestions ou ses descriptions sous forme matérielle dans un rôle ou des gestes purement mécaniques. C'est tout le contraire.

- **Section 2 – Definition of "every original work…"**

Who is the author of a web site? What is the level of originality required for a web site to be protected?

Animal Welfare International Inc. v. W3 International Media Ltd., 2014 CarswellBC 2902 (B.C.S.C.; 2014-10-01) Ross J.

> [463] In *Slumber-Magic Adjustable Bed Co. Ltd. v. Sleep-King Adjustable Bed Co. Ltd.* (1984), 1984 CanLII 54 (BC SC), 3 C.P.R. (3d) 81 at 84, [1985] 1 W.W.R. 112 (B.C.S.C.), Madam Justice McLachlin, as she then was, held that provided "work, taste and discretion have entered into the composition, that originality is established". The Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 (CanLII) at para. 25, held that the standard by which to judge originality can be measured as:
>
> > 25 The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. While creative works will by

> definition be “original” and covered by copyright, creativity is not required to make a work “original”.

[464] The relevant considerations to determining originality were further examined in *BCAA* [*BCAA v. Office and Professional Employees' Int. Union*, 2001 BCSC 156 (B.C.S.C.; 2001-01-26)] at para.186, where the Court held:

> [186]…the overall arrangement of commonplace elements such as colours, shapes and designs can obviously result in an original artistic work for which the author is entitled to copyright protection. Such a work cannot be copied without the author’s consent.

[465] [The Plaintiff] AWI submits that based on the considerations relevant to determining originality, as outlined in the jurisprudence, the originality of the website is reflected in its general look and feel, which encompass the products selected to appear on the homepage, the size of the product photos, the size of the price text, the selection of an image to function as a logo for the website, the location of the logo, and the general location of images, text, and icons on the webpage.

[466] AWI submits that the website layout was implemented, finalized and updated on instruction from AWI. There is no evidence the website was created using standard form templates or standard colour and icon schema. The atypical placement of icons, varied icon sizing, decisions as to where top selling products would be listed, if prices would be listed on the homepage, how often the products on the homepage changed, and the overall website layout and colour scheme are all indicative of CVT being an original creation.

- **Section 2 – Definition of "every original work…"**

There is no originality in mere numercial codes.

Denturist Group of Ontario v. Denturist Association of Canada, 2014 CarswellNat 4191 (F.C.; 2014-10-16) Manson J.

> [64] In order for copyrights to be valid, an author must have produced an original work that required his or her skill and judgment to create

> (*CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 (CanLII), [2004] 1 SCR 339 at para 16 [*CCH*]). The requisite levels of skill and judgment must meet the low criteria of not being "so trivial that it could be characterized as a purely mechanical exercise" and exhibit some intellectual effort on the part of the author" (*CCH* at paras 16, 33-34).
>
> [75] I do not find that there is sufficient originality or skill and judgment to justify copyright subsisting in mere five-digit numerical codes and/or the functional descriptions of the denturist services associated with those codes.

- **Section 2 – Definition of "infringing copy"**

Infringement of a copyright work is a valid ground of opposition to the registration of a trade-mark but copy will have to be proven.

dm-drogerie markt GmbH + Co. KG v. 911979 Alberta Ltd.*, 2014 CarswellNat 1300, 2014 CarswellNat 1301 (Opp. Bd.; 2014-03-12) C. Tremblay

> [38] I turn to the second prong of the ground of opposition based on allegations that the use of the Mark is in violation of the Opponent's copyright existing in labels shown in print-outs attached to the statement of opposition.
>
> [39] I have found that paragraph 6 and Exhibit "F" of the Gallivan affidavit constitute inadmissible hearsay. Further, the Opponent did not make any submissions about the second prong of the ground of opposition. Thus, I conclude that the Opponent has failed to make out a *prima facie* case of copyright infringement [see *E. Remy Martin & Co. S.A. v. Magnet Trading Corp. (HK) Ltd.* (1988), 23 C.P.R. (3d) 242 (T.M. Opp. Bd.)].

- **Section 2 – Definition of "infringing"**

Independent creation warants a finding of non infringement.

Geophysical Service Incorporated v. Canada-Nova-Scotia Offshore Petrolium Board, 2014 CarswellNat 2186 (F.C.; 2014-05-09) Annis J.

> [32] Given the limited contribution of the applicant's data to Figure 5.5 and its extensive manipulation and reworking by the Board, with the overwhelming majority of the data being provided from other

sources, I do not find that Figure 5.5 constitutes a reproduction or adaptation such as to constitute an infringement of GSI's copyright.

- **Section 2 – Definition of "infringing copy**

Infringement of a copyright work is a valid ground of opposition to the registration of a trade-mark but copy will have to be proved.

Forest Stewardship Council v. G.H. Imported Merchandise & Sales Ltd.,* 2014 CarswellNat 2420 (Opp. Bd.; 2014-05-13) C.R. Folz

> [25] Section 30(i) of the Act requires that an applicant declare itself satisfied that it is entitled to use the applied-for mark. Jurisprudence suggests that non-compliance with section 30(i) can be found where there is a *prima facie* case of non-compliance with a federal statute [such as the *Copyright Act* RSC 1985, c C-42, *Food and Drugs Act* , RSC 1985, c F-27 or *Canada Post Corporation Act* , RSC 1985, c C-10 and see *Interactiv Design Pty Ltd v Grafton-Fraser Inc* (1998), 87 CPR (3d) 537 (TMOB), at 542-543)].
>
> [26] In this case, the Opponent pleads that the application does not comply with section 30(i) because the Applicant has violated the *Copyright Act*. In order to meet its evidential burden under this ground, the Opponent must establish a *prima facie* case of copyright infringement [see *E Remy Martin & Co SA v Magnet Trading Corp (HK)* (1988), 23 CPR (3d) 242 , (TMOB)].
>
> [27] In order to establish a *prima facie* case of copyright infringement, the Opponent is required to establish (i) copyright in its tree design and (ii) that the Mark is a substantial copying of this tree design [see *Jones v Dragon Tales Production Inc* (2002), 27 CPR (4th) 369 (TMOB)].
>
> [28] Attached as Exhibit A to the affidavit of Monika Patel is a copy of a copyright assignment from the business records of the Opponent in which Tristan Kent of Kent, England, assigns to the Opponent all copyright rights in all countries and territories of the world in the works as defined therein (including the Opponent's FSC and Tree Design). The Opponent submits that the document speaks for itself and shows that the Opponent has copyright in its tree design and is the owner of the copyright.

> [29] The Opponent further submits that the Mark is a substantial copying of the Opponent's mark because both tree designs incorporate the following unique elements:
> • a hollow silhouette of a tree;
> • an opening at the bottom of the design; and
> • the use of a single continuous line in the design.
>
> [30] In my view, there are too many points of dissimilarity between the Mark and the Opponent's tree design and too few points of similarity between them for me to conclude there is a *prima facie* case of copyright infringement. In this regard, the Mark features a round shaped tree, bordered by a square shaped element. The Opponent's mark, on the other hand, features a more triangular shaped tree combined with a check mark shape, both of which are shown in a bold, regular style in black against a white background. The Opponent's mark also includes the large and prominent letters FSC.
>
> [31] As I am not satisfied that the evidence supports a *prima facie* case of copyright infringement, this ground of opposition fails.

Section 2 – Definition of "infringing copy"

Infringement of a copyright work is a valid ground of opposition to the registration of a trade-mark but copy will have to be proven.

General Motors LLC v. Wang,* 123 C.P.R. (4th) 139 (Opp. Bd.; 2014-06-11) L.Reynolds

> [16] The second ground of opposition which has been raised under section 30(i) of the Act is based on an allegation that the Applicant could not have been satisfied that it was entitled to use the Mark at the time of the filing of the application as the design component of the Mark is an identical copy of a work that is the subject of copyright registration No. 1090977 and its use would therefore be in violation of the *Copyright Act* RSC, 1985, c C-42. The Opponent asserts that this issue has already been decided by the Board in *Chery Automobile Co. v. Wang*, 2013 TMOB 104 (T.M. Opp. Bd.).
>
> [17] Non-compliance with section 30(i) can be found where a *prima facie* case of non-compliance with a federal statute has been made out [see for example *Interprovincial Lottery Corp. v. Monetary Capital Corp.* (2006), 51 C.P.R. (4th) 447 (T.M. Opp. Bd.) and *Canadian Bankers' Assn. v. Richmond Savings Credit Union* (2000), 8 C.P.R. (4th) 267 (T.M. Opp. Bd.)]. However, in the present case, the

> Opponent has not established a *prima facie* case of copyright infringement, as it has not filed any evidence whatsoever in support of its allegations [see *E. Remy Martin & Co. S.A. v. Magnet Trading Corp. (HK) Ltd.* (1988), 23 C.P.R. (3d) 242 (T.M. Opp. Bd.)]. Rather, it has simply referenced a recent decision of the Board involving a similar design and the same parties in its pleading.

- **Section 2 – Definition of "infringing"**

Infringement requires the copying substantive part of an original work.

Animal Welfare International Inc. v. W3 International Media Ltd., 2014 CarswellBC 2902 (B.C.S.C.; 2014-10-01) Ross J.

> [461] The elements of a successful copyright infringement claim were outlined by the Court in *Ibcos Computers Ltd. v. Barclays Mercantile Highland Finance Ltd.*, [1994] F.S.R. 275 (Ch. D) [*Ibcos*]. Citing *Ibcos*, the Court in *BCAA* [*BCAA v. Office and Professional Employees' Int. Union*, 2001 BCSC 156 (B.C.S.C.; 2001-01-26)] held, at para. 173, that it must be established that:
>
> 1. there is an original work;
> 2. there has been a copying; and
> 3. a substantial portion of the work has been reproduced.

- **Section 2 – Definition of "infringing"**

Incomplete deletions of references to the copyright owner in the copy will help to ascertain infringement.

Animal Welfare International Inc. v. W3 International Media Ltd., 2014 CarswellBC 2902 (B.C.S.C.; 2014-10-01) Ross J.

> [467] With respect to the second element, copying, [the Plaintiff] AWI submits that the fact that CanaCreek was created by significantly copying CVT cannot be disputed. Both Myfanwy and Marcellus Wong testified that [the Defendant] W3 technicians copied the CVT website for use as a template for CanaCreek. W3 then scrubbed the copied CVT website for references to AWI and CVT and inserted CanaCreek in place of CVT. However, the process was incomplete and some references to CVT remained on the website.

- **Section 2 – Definition of "infringing"**

Acknowledging the source may not be sufficient to escape infringement.

La Presse v. Yahoo! Québec, 2014 CanLII 76357 (Que. Conseil de presse; 2014-12-05)

> [6] À la lecture des deux articles et du tableau comparatif fourni par les plaignants, le Conseil constate que l'article signé par Martine Turenne est constitué dans sa quasi-totalité de passages de l'article de *La Presse* réécrits très légèrement (permutations, reformulations mineures, modification de la ponctuation) et de plusieurs passages repiqués intégralement, sans l'utilisation de guillemets. Seuls le titre et les phrases d'amorce (« La corruption, de l'histoire ancienne au Québec? Pas vraiment. ») sont attribuables à Mme Turenne. Le Conseil a établi qu'au total, 94 % du texte est du repiquage intégral ou quasi intégral.
>
> [7] Le texte publié par Yahoo! n'apporte ni nouvelle perspective, ni recherche originale, suivi, nouveaux renseignements, ou réactions supplémentaires, par rapport à l'article de Mme Lévesque et de M. Bergeron.
>
> [8] Bien que *La Presse* soit mentionnée comme une source à quatre reprises dans le texte publié par Yahoo! Québec, le Conseil estime que dans un cas aussi poussé de reproduction intégrale, le fait de ne pas attribuer rigoureusement, par des guillemets, chaque passage du texte ainsi repris est une faute déontologique qui risque d'induire le public dans l'erreur quant au véritable auteur du texte.
>
> [9] Le Conseil s'interroge par ailleurs quant aux limites que devraient respecter les médias lorsqu'ils citent des articles écrits par d'autres. Est-il acceptable par exemple de publier un texte composé en totalité de citations, dûment placées entre guillemets, provenant d'un article publié dans un autre média, même si le texte est pleinement

> attribué? Lorsqu'il cite des extraits d'un reportage provenant d'un autre média, doit-il s'imposer un traitement minimal pour publier un texte? Dans le cas de la présente plainte, il aurait sans doute été souhaitable que l'autorisation des auteurs ait été obtenue. Le Conseil estime que dans un cas où les contraintes de la pratique journalistique ne permettent pas de bonifier une information, mieux vaut produire un très court résumé du contenu que l'on souhaite reprendre, et l'accompagner d'un hyperlien conduisant à la source citée.

- **Section 2 – Definition of "legal representative"**

An authorization must be from the copyright owner or his legal representative.

Pokora v. 9064-0723 Québec inc., 2014 QCCQ 5697 (Que. Ct. – Small Claims; 2014-05-14) Chicoine J.

> [5] **CONSIDÉRANT** que dame Berry-Fortin, alors amie du demandeur, n'avait aucune autorité ni mandat pour lier l'une ou l'autre des sociétés défenderesses;

- **Section 2 – Definition of "literary work"**

A computer program is a literary work.

Tremblay v. Plourde, [2014] J.Q. 419 (Que. Sup. Ct.; 2014-01-15) Dallaire J.

[267] Cette page web couverte en vertu de la *Loi sur le droit d'auteur* est la propriété de la demanderesse.

> [268] En effet, la *Loi sur le droit d'auteur* prévoit à son article 2 que le programme d'ordinateur est une œuvre littéraire [Fn 12 *Loi sur le droit d'auteur,* LRC 1985, c C-42.]

- **Section 2 – Definition of "maker"**

Two components are required: hiring of artists and making or representing a work.

Union des artistes v. Festival International de Jazz de Montréal, 2014 CarswellQue 6042 (Que. C.A.; 2014-06-19) Doyon J. [affirming 2012 CarswellQue 7518 (Que.

Sup. Ct.; 2012-04-23] which was refusing judicial review of 2010 QCCRT 523 (Que. Lab. Bd.; 2010-11-08)]

> [34] La CRT rappelle que la notion de producteur au sens de l'article 2 de la *LSA* recèle deux composantes : 1) la rétention des services d'un artiste 2) en vue de produire ou de représenter en public une œuvre artistique dans un domaine de production visé par la *LSA*. Cette interprétation est conforme à la jurisprudence [Fn8 *Union des artistes (UDA) c. Louis-Philippe Métail, faisant affaire sous le nom «Animation d'Autrefois»*, 2010 QCCRT 0134, D.T.E. 2010T-428, paragr. 93.] et n'est pas remise en question.
>
> [35] La première composante a toujours été au cœur de la reconnaissance du statut de producteur [Fn9 *Union des artistes (UDA) c. Louis-Philippe Métail, faisant affaire sous le nom «Animation d'Autrefois»*, 2010 QCCRT 0134, D.T.E. 2010T-428, paragr. 97-99]. C'est d'ailleurs ce que souligne le juge Senécal, de la Cour supérieure, dans *2623-3494 Québec inc. (Café Sarajevo) c. Commission de reconnaissance des associations d'artistes et des associations de producteurs*, lorsqu'il écrit que « [l]a rétention de services est donc au cœur de la relation producteur-artiste. Celle-ci ne peut exister sans celle-là [Fn10 *2623-3494 Québec inc. (Café Sarajevo) c. Commission de reconnaissance des associations d'artistes et des associations de producteurs*, J.E. 2004-606, D.T.E. 2004T-265, paragr. 57]».
>
> [36] Cette rétention de services renvoie à la notion de contrôle:
>
> Selon cette définition, un producteur doit être assimilé à un maître d'oeuvre, c'est-à-dire à la personne qui assume la direction et le contrôle d'une production musicale ou, plus précisément, à celle qui voit à l'élaboration du projet et à sa réalisation. Dans cette optique, le producteur est notamment responsable du choix des musiciens et du financement du spectacle, ce qui inclut la rémunération des musiciens et tous les risques financiers liés à la production du spectacle. [Fn11 *Guilde des musiciens du Québec c. Chacra*, D.T.E. 2001T-346.]

- **Section 2 – Definition of "photograph"**

A commercial photograph is a protected work.

Labrecque (O Sauna) v. Trudel (Centre Bellaza, s.e.n.c.), 2014 QCCQ 2595 (Que. Ct. – Small Claims; 2014-03-28) Gervais J.

> [53] La conclusion étant que le cliché photographique dont il est question ici est une œuvre protégée, s'offre au propriétaire de ce droit plusieurs options.

- **Section 2 – Definition of "work of joint authorship"**

A work of joint authorship is not a collective work.

Lachance v. Productions Marie Eykel inc., 2014 CarswellQue 637 (Que. C.A.; 2014-01-30), the Court [confirming 2012 CarswellQue 5028 (Que. Sup. Ct; 2012-03-15]

> [17] Le premier cible la détermination factuelle de la juge qui, dans ses motifs, écrit que l'appelant est l'un des auteurs de l'œuvre précitée au sens de la *LDA*. La qualification d'« œuvre collective » qui apparaît dans les motifs est inexacte, mais une lecture attentive du jugement permet de comprendre que l'emploi de cette expression par la juge résulte d'une confusion lexicale [Fn 8 Le vocable qu'utilise la juge est un emprunt de l'anglais à l'art. 2 des définitions, puisque ce terme n'est pas défini en français, qui y utilise le mot recueil comme traduction de « *collective work* ». Mais dans le contexte de cette affaire, il semble clair que la juge ne pouvait avoir présent à l'esprit une œuvre se qualifiant comme recueil. Il s'agit plutôt d'une œuvre de collaboration dont la définition est : « Oeuvre exécutée par la collaboration de deux ou plusieurs auteurs, et dans laquelle la part créée par l'un n'est pas distincte de celle créée par l'autre ou les autres »] dénuée de conséquence. Il s'agit manifestement ici d'une œuvre de collaboration et c'est ce que décrit la juge. Lorsque, en raison de sa collaboration, la juge a qualifié l'appelant d'auteur, il est possible qu'elle se soit méprise sur certains éléments de preuve versés au dossier. Néanmoins, la question en est une de fait, sans impact sur le dispositif du jugement, et il n'est pas démontré que la détermination de la juge est entachée d'une erreur manifeste et déterminante; la question n'a donc pas à être réexaminée ici.

- **Section 2 – Definition of "work of joint authorship"**

The input of the authors must be substantial and not trivial.

Atlantic Canada Regional Council of Carpenters, Millwrights, and Allied Workers v. Maritime Environmental Training Institute Ltd., 2014 CarswellNS 125, 2014 NSSC 64, 237 A.C.W.S. (3d) 746, 1081 A.P.R. 1, 341 N.S.R. (2d) 1,

http://www.canlii.org/en/ns/nssc/doc/2014/2014nssc64/2014nssc64.html (S.C. N.S.; 2014-02-20) Robertson J.

> [23] Cased cited by the respondents *Neudorf v. Nettwerk Productions Ltd.* 1999 CanLII 5293 (BC SC), (1999), B.C.J. No. 2831, [2000] 3 W.W.R. 522 and *Wall v. Horn Abbott Ltd.,* 2007 NSSC 197, also set out the requirements for joint authorship that include both originality and expression. Although it is not required that joint authors make an equal contribution, the joint author must made a substantial contribution to the expression of the ideas.
>
> [26] I have carefully read the affidavit evidence of Gus Doyle [Applicants' representative]. The applicants have failed to convince me, on the civil standard of the balance of probabilities, that the scaffolding manual was a work of joint authorship. His affidavit evidence does not establish in any manner, the applicants' contribution to the creation of this work. His affidavit consists of bare assertions as to ownership of the work. It appears to me to be a commissioned work written by the unknown UK company. I am persuaded that the UK company was the original author of the manual in whom the copyright would have vested in 1991. Clearly there was no assignment of the copyright by the UK company.

- **Section 2.4 – Communication to the public by telecommunication**

Distribution of a netwok signal and its subsequent communication constitutes a single communication. Each retransmission is not a separate act of infringement.

Leuthold v. Canadian Broadcasting Corporation, 2014 CarswellNat 2246 (F.C.A.; 2014-06-27) Pelletier J. [affirming 104 C.P.R. (4th) 401 (F.C.; 2002-06-14); motion for leave to appeal to the Supreme Court of Canada filed 2014 CarswellNat 3986 (S.C.C.; 2014-09-30)]

> [38] It seems to me that the better view is that paragraph 2.4(1)(c) legislates that the distribution of a network signal incorporating a protected work to BDUs and the subsequent communication of that work to subscribers is but a single network-wide infringement in which each participating BDU is jointly and severally liable along with the network. In that way, all those who benefit from the communication of the work share in the liability for compensating the rights holder, subject to whatever arrangements may be in place between them.

> [39] This reading of paragraph 2.4(1)(c) of the Act moves in the direction of technological neutrality in that the number of infringing acts does not vary according to the number of intermediaries in the transmission chain. This is consistent with the goal of technological neutrality which the Supreme Court articulated in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231, at paragraphs 5-10.
>
> [40] There is one act of infringement whether the work is communicated to the public via one BDU or via hundreds of them. The measure of damages may depend upon the number of viewers of the work, which has a rational connection with compensation, unlike the number of intermediaries, which does not.
>
> [41] Paragraph 2.4(1)(c) serves to distinguish this case from *Bishop v. Stevens* [[1990] 2 S.C.R. 467] where, as noted, each unauthorized reproduction was found to be a violation of the copyright holder's rights. While that may have been the case for unauthorized communications to the public by telecommunication prior to the passage of paragraph 2.4(1)(c) and its companion disposition subsection 31(2) of the Act, it is no longer the case now.
>
> [42] I am of the view that paragraph 2.4(1)(c), properly interpreted, has the effect of making a network transmission of cable programming material to the public via BDUs a single infringement of a copyright holder's rights if the network has not properly cleared the rights with respect to that transmission. In this case, the six transmissions of the documentary containing Ms. Leuthold's images, in violation of her copyright, constituted six acts of infringement, as found by the Trial Judge.

- **Section 3 – Copyright in works**

The right to reproduce and the right to execute are different rights.

Canadian Broadcasting v Sodrac 2003 Inc., 118 C.P.R. (4th) 79 (F.C.A.; 2014-03-31) Pelletier J. [leave to appeal to the Supreme Court of Canada granted [2014] S.C.C.A. 249 (S.C.C.).]

> [48] In my view, this passage reaffirms the fundamental distinction between reproduction and performance (communication to the public by telecommunication) that the Court articulated in *Bishop v. Stevens.* Nothing in this passage, or elsewhere in *ESA*, would

> authorize the Board to create a category of reproductions or copies which, by their association with broadcasting, would cease to be protected by the Act. ESA did not explicitly, or by necessary implication, overrule *Bishop v. Stevens*.
>
> [49] As a result, I am unable to accept the Broadcasters' argument that the comments about technological neutrality in *ESA* have changed the legal landscape to the point where the Board erred in finding that incidental copies are protected by copyright. The Broadcasters' argument with respect to technological neutrality fails.

- **Section 3 – Copyright in works**

The principle of technologically neutral interpretation is again before the Supreme Court of Canada.

Canadian Broadcasting v Sodrac 2003 Inc., 118 C.P.R. (4th) 79 (F.C.A.; 2014-03-31) Pelletier J. [Leave to appeal to the Supreme Court of Canada granted [2014] S.C.C.A. 249 (S.C.C.).]

> Case summary as prepared by the Office of the Registrar of the Supreme Court of Canada (Law Branch) for information purposes only.
>
> Intellectual property law — Judicial review — Copyright — Licenses — Licensing societies — Royalties — Ephemeral copies — Application by broadcaster for review of licenses issued by Copyright Board allowed in part — Collective society imposing royalties on producers of content and broadcasters — Licences allow collective society to collect royalties for copies incidental to use of new broadcast technologies — Whether the Court of Appeal erred in refusing to apply the principle of technological neutrality in its interpretation and application of the Copyright Act, R.S.C. 1985, c. C-42 — Whether the Court of Appeal erred by adopting a non-technologically neutral interpretation of the Copyright Act that fails to achieve the correct balance between the rights of copyright holders and users, as well as the public interest in fostering innovation — Whether the Court of Appeal erred by departing from this Court's jurisprudence on the grounds that they provide insufficient guidance.
>
> SODRAC applied to certify a proposed tariff which related to the royalties on copies of cinematographic works for retail, rental and theatrical use. It also applied to set the terms and conditions of a licence for the reproduction of musical works in its repertoire by the

> CBC. The Board consolidated the examination of the CBC and another arbitration matter.
>
> The application was allowed. The tariff was certified, and licences were issued to CBC and the other broadcaster. An interim order extended the 2008-12 licence pending a final determination of SODRAC's s. 70.2 application concerning licences covering 2012-16.
>
> CBC sought judicial review to set aside several terms in a 2008-12 licence (Federal Court of Appeal File No. A-516-12). It also sought judicial review of the extension of the 2008-12 licence (Federal Court of Appeal File No. A-63-13)

- **Section 3 – Copyright in works**

The viewer, reader or listener is not liable to the owner of the copyright for infringement merely by virtue of having seen or heard the infringing material.

Geophysical Service Incorporated v Nwest Energy Corp., 2014 CarswellAlta 546 (Alta. Q.B.; 2014-04-07) Robertson, Master

> [67] The claims for breach of confidence and copyright infringement, as I understand it, proceed from the premise that the simple receipt of information, either confidential information or copyright material, creates a liability to the owner of the confidential information or the copyright work, even if the recipient was unaware of the confidentiality claim or the copyright by the owner.
>
> [78] In regards to copyright, the claim is in essence that if a person obtains a pirated copy of copyright material and performs it, or shows it to others, or plays it on the radio, then the viewer, reader or listener is liable to the owner of the copyright for infringement merely by virtue of having seen or heard it. The *Copyright Act* (Canada) goes to great lengths to define what constitutes infringement of copyright, but I have been unable to find in any of the definitions and exceptions to definitions that merely receiving, reading, or hearing a copyright work constitutes infringement, even if the recipient knew that the work is a pirated copy

- **Section 3 – Copyright in works**

Incorporeal rights should not be confused with their embedying media.

London Life, compagnie d'assurance-vie c. Canada,* 2014 CarswellNat 1276 (F.C.A.; 2014-04-29) Gauthier J.

> [56] Incorporeal rights should not be confused with physical media. For example, copyright in a work is not seized by seizing the book itself..

- **Section 3 – Copyright in works**

Dowloading involves the right of reproduction rather than the right of communication.

Re:Sound No. Tariff 8– Non-interactive and semi-interactive webcasts, 2009-2012, 2014 CarswellNat 1577 (Cop. Bd.; 2014-05-16) the Board

> [214] Second, since the decision of the *Supreme Court of Canada in Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, [FN2 2012 SCC 34] downloads of musical works or other subject-matter do not engage the right of communication to the public by telecommunication but only the reproduction right. Therefore, the distinction between a communication anda transmission, when referring to copyright-protected content, is now very important. A communication is a type of transmission but not all transmissions are communications.

- **Section 3 – Copyright in works**

An ancillary use that should be dealt with at the same time as the main use.

Public Performance of Sound Recordings, Re [Re:Sound No. Tariff 8 – Non-interactive and semi-interactive webcasts, 2009-2012] 2014 CarswellNat 1577Cop. Bd.; 2014-05-16)

> [72] In our view, the Internet simulcast of a radio station's over-the-air signal is a textbook example of an ancillary use that should be dealt with at the same time as the main use. The value per listener for simulcasting and for over-the-air broadcasting is the same. That value is best achieved by attaching the ancillary use to the main one. Accordingly, the royalties should be proportional to the relative audience. [Fn24 *Supra* note 5 [*SOCAN-Re:Sound CBC Radio Tariff, 2006-2011* (8 July 2011) Copyright Board Decision.] at paras. 118-120. This is in contrast with the American approach, which treats radio simulcasting as a separate product: 17 USC 114(d)(1), CFR 380.3(a)(1).]

- **Section 3 – Copyright in works**

Infringement involves the reproduction of an important part of the protected work.

Hayward Industries inc. v. Équipements de piscine Carvin inc., 2014 CarswellQue 5143 (Que. Sup. Ct.; 204-05-27 Morrison J.

> [70] Par contre, il n'est pas suffisant, pour les fins d'établir une contravention du droit d'auteur, de démontrer qu'une partie d'un œuvre a été copiée.
>
> [71] Pour réussir à établir qu'il y a eu telle contravention, l'œuvre, dans ce cas le texte des manuels d'instructions de Hayward, doit être «original» [Fn17 *Loi sur le droit d'auteur*, L.R.C. (1985), c. C-42, art. 5 (1)] et une «partie importante»[Fn18 *Loi sur le droit d'auteur*, L.R.C. (1985), c. C-42, art. 3(1)] devrait être copiée.
>
> [72] Selon Carvin, un manuel d'instructions pour l'utilisation d'un chlorateur n'est qu'un document qui aide un consommateur à utiliser le produit. Dans le cas des produits similaires dans la même industrie, elle plaide que ce n'est pas surprenant que les manuels soient similaires, vu le manque d'originalité et de créativité inhérent.
>
> [73] À cet égard et par analogie, elle fait référence à une décision ontarienne [Fn19 *Kilvingston Bros. Ltd*. v. *Herbert Goldberg et al*., (1957) 16 Fox Pat., p. 164-168], en citant le juge Judson de la Cour Suprême de l'Ontario :
>
> > The similarities are plain to be seen but they do not enable me to draw an inference of copying. Tombstone workers working on a task of this kind are working with common ideas and with only a limited field for the expression of those ideas. It is not surprising that the results are similar.
>
> [74]Autrement dit, l'information que contiennent les manuels des deux parties vient d'une «source commune», soit, dans le présent cas, l'opération des chlorateurs au sel pour piscine, ce qui fait que les idées à être exprimées dans les manuels sont communes [Fn20 *Caron* c. *Association des pompiers de Montréal inc*., 1992 CarswellNat 691, 42 C.P.R. (3d) 292 (Cour fédérale du Canada)].
>
> [75] De plus, Carvin plaide que les textes auxquels fait référence Hayward comme étant copiés directement ou modifiés légèrement ne constituent pas une «partie importante» des manuels.

> [76] À cet égard, l'expression «partie importante» ne signifie pas uniquement une perspective quantitative mais aussi, et de façon plus importante, qualitative [Fn21 *1429539 Ontario Limited* c. *Café Mirage Inc*., 2011 FC 1290, par. 122]. Hayward ne plaide pas l'aspect qualitatif de ses manuels. Elle se fie principalement sur la perspective quantitative.
>
> [77] Considérant ce qui précède, à ce stade des procédures, la preuve est telle que le plus que l'on puisse dire est que le droit de Hayward est douteux quant à la contrefaçon d'un droit d'auteur, et le Tribunal en conclut ainsi.

- **Section 3 – Copyright in works**

Copyright is an exclusive right to deal with the protected work.

Flansberry (Kapture Design) v. 6548890 Canada inc. (Turbo Marketing), 2014 CarswellQue 11833 (Que. Ct; 2014-06-01) Lapointe J.

> [70] Le débat qui reste est celui de la titularité du droit d'auteur. Cette question peut trouver réponse en déterminant d'abord qui est l'auteur des travaux et ensuite si les droits de l'auteur ont été cédés. L'article 3 L.d.a. cerne l'ampleur du droit d'auteur et son importance en un principe clair. Le droit d'auteur est le droit exclusif de produire ou de reproduire une œuvre sous une forme matérielle (art. 3 L.d.a.).

- **Section 3 – Copyright in works**

Infringement involves the reproduction of an important part of the protected work.

Animal Welfare International Inc. v. W3 International Media Ltd., 2014 CarswellBC 2902 (B.C.S.C.; 2014-10-01) Ross J.

> [468] The final requirement to establish that a breach of copyright has occurred is that the original work which was copied was actually substantially reproduced in the copied work and not just reproduced in discrete parts. The Court in *British Columbia Jockey Club v. Standen*, 1983 CanLII 322 (BC SC), [1983] 4 W.W.R. 537, 73 C.P.R. (2d) 164 (B.C.S.C.), aff'd 1985 CanLII 591 (BC CA), [1985] 6 W.W.R. 683, 8 C.P.R. (3d) 283 (B.C.C.A.), confirmed that "substantial", as used in s. 3 of the *CA* [*Copyright Act*], does not mean identical. Text

> can be identified as substantially copied even if the language is altered.

- **Section 3 – Copyright in works**

In a contest, there is no implied conditions that what will be submitted will not infringe the copyright of third parties.

Cayouette v. RNC Media inc., [2014] J.Q. 13537 (Que. Ct. – Small Claims; 2014-09-22) Lachapelle J.

> [32] RNC Media qui est bien au fait des problèmes potentiels reliés à la question des droits d'auteur aurait dû indiquer clairement que les participants qui soumettaient des photos provenant de l'internet ou d'autres sources seraient disqualifiés.
>
> [34] Le Tribunal estime que RNC Media a effectivement manqué à son obligation de divulguer toutes les conditions et les modalités d'obtention du prix. Par conséquent, conclut que madame Cayouette a droit à des dommages-intérêts.

- **Section 5 – Conditions of subsistence of copyright**

Copyright only protects the expression of ideas. A work must be in a fixed material form to attract copyright.

J. v. M., 117 C.P.R. (4th) 409 (B.C. S.C.; 2014-01-23) Bunyeat J.

> [57] The "Work" is a business system using the computers of DC at SCMI and is not capable of protection under the *Act*. The Work is not a work in which copyright may subsist within the meaning of the *Act*. […]
>
> It flows from the fact that copyright only protects the expression of ideas that a work must also be in a fixed material form to attract copyright protection: see s. 2 definitions of "dramatic work" and "computer program" and, more generally, *Goldner v. Canadian Broadcasting Corp.* (1972), 7 C.P.R. (2d) 158 (F.C.T.D.), at p. 162; *Grignon v. Roussel* 1991 CanLII 6894 (FC), (1991), 38 C.P.R. (3d) 4 (F.C.T.D.), at p. 7.

> [58] Section 5 of the *Act* describes the types of works in which copyright may subsist as being in "every original literary, dramatic, musical and artistic" work. Section 2 of the *Act* defines "literary work" to include a "computer program", which is further defined as a "set of instructions or statements, express, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result". The definition of "artistic work" includes "architectural works" which are themselves defined as "any building or structure or any model of a building or structure".
>
> [59] The fact that the *Act* does not protect ideas means that there is no copyright in any arrangement, system, scheme or method for doing a particular thing or process: *Delrina Corp. (c.o.b. Carolian Systems) v. Triolet Systems Inc.* 2002 CanLII 11389 (ON CA), (2002), 58 O.R. (3d) 339 (C.A.) at para. 35.

- **Section 5 - Conditions for subsistence of copyright**

Originality is not a matter of quantity.

Planification-Organisation-Publications Systèmes (POPS) Ltée v. 9054-8181 Québec Inc., 124 C.P.R. (4th) 161 (F.C.A.; 2014-07-25) Gauthier J. [varying 111 C.P.R. (4th) 1 (F.C.; 2013-04-25)]

> [79] I note that the originality of a work is not measured by the number of lines. […]

- **Section 13 – Ownership of copyright**

The employer is the first owner of the copyright in works created by his employee.

J. v. M., 117 C.P.R. (4th) 409 (B.C. S.C.; 2014-01-23) Bunyeat J.

> [61] Even if I am incorrect in coming to the conclusion that the Plaintiff could have no claim under the *Act*, I would have also concluded that any claim to copyright for what was produced by the Plaintiff and others in their employ at SCMI would result in a claim being available to SCMI under the *Act*.

- **Section 13 – Ownership of copyright**

The employer is the first owner of the copyright in works created by his employee.

Lachance v. Productions Marie Eykel inc., 2014 CarswellQue 637 (Que. C.A.; 2014-01-30), the Court [confirming 2012 CarswellQue 5028 (Que. Sup. Ct.; 2012-03-15]

> [11] Sur le moyen d'appel principal, l'appelant invite la Cour à faire une lecture restrictive de l'article 13(3) de la *LDA*, du seul fait qu'il s'agirait d'une dérogation à la règle générale édictée à l'article 13(1) qui accorde la possession d'une œuvre à son auteur. Sans nécessairement partager tous les motifs de la juge de première instance, la Cour est d'avis qu'en l'espèce elle a correctement appliqué les conditions nécessaires à l'application de l'article 13(3) au regard de la preuve administrée. En effet, l'employeur est titulaire du droit d'auteur dans l'œuvre de son employé lorsque les conditions suivantes sont satisfaites :1) une œuvre est créée dans le cadre d'un contrat d'emploi; 2) pareille œuvre est créée par l'employé dans l'exercice de cet emploi; et 3) il n'y a pas une stipulation à l'effet contraire [Fn 5 Normand Tamaro, *Le droit d'auteur - Fondements et principes*, Montréal, Presses de l'Université de Montréal, 1994, p. 157; *Canadian Copyright Act - Annotated*, Hugues G. Richard *et. al*., éditeurs, vol. 2, Carswell, Toronto, feuille mobile, janvier 2014, pp. 12-13]. C'est donc à bon droit que la juge a noté [Fn 6 Jugement entrepris, paragr. 46 à 50] que la preuve démontre l'existence des trois conditions donnant ouverture à une telle application au bénéfice de l'employeur.
>
> [12] De surcroît, à maintes reprises durant son témoignage [Fn 7 Voir notamment interrogatoire en chef et contre-interrogatoire :pp. 719 à 721; p. 758; p. 764; p.773; pp. 785 à 789; p. 882 et 883; p. 894.], l'appelant a admis que c'est son employeur qui seul avait le droit sur l'œuvre (et partant le droit d'en exploiter les droits dérivés).

- **Section 13 – Ownership of copyright**

Statutory provisions in regards of copyright ownership may be varied by contract.

Ahern v. 1772887 Ontario Ltd. (Mariage Québec), 2014 QCCQ 973, (Que. Ct.; 2014-02-05) Richard J.

> [21] Finalement, en annexe à la facture du 17 mai 2007, M. Ahern décrit l'entente verbale intervenue avec une représentante de Mariage Québec par laquelle il vend ses droits de reproduction des photographies au magazine Mariage Québec ou pour toute autre publication de ce magazine à venir et non pour toute autre utilisation. [i.e. Jean-Yves Ahern garde cependant le copyright sur ces photos et

> il se réserve le droit d'utiliser les dites photos à titre promotionnel, et ce à partir du mois de décembre 2007.]
>
> [22] Aucune preuve de Mariage Québec ne contredit cette entente.
>
> [23] Conséquemment, le Tribunal conclut que M. Ahern conserve son droit d'auteur sur les photographies prises entre 2007 et 2009 à la demande de Mariage Québec, pour toute utilisation autre que le magazine qu'elle publie.

- **Section 13 – Ownership of copyright**

Class action for copyright infringement may be appropriate but any settlement agreement must be fair to all class members.

Waldman v. Thomson Reuters Canada Limited, 120 C.P.R. (4th) 127, (Ont. Sup. Ct.; 2014-03-04) Perell J.

> [95] I, however, do not find that the Settlement Agreement is substantively, circumstantially, or institutionally fair to Class Members. In this regard, I agree with the general sentiment of the objectors to the Settlement that the Settlement Agreement brings the administration of justice and class actions into disrepute because: (a) the Settlement is more beneficial to Class Counsel than it is to the Class Members; and (b) in its practical effect, the Settlement expropriates the Class Members' property rights in exchange for a charitable donation from Thomson.
>
> [96] The case at bar is not like Robertson v. Thomson Canada Ltd., [2009] O.J. No. 2650 (S.C.J.), where Justice Cullity approved a settlement in a copyright infringement class action. In the Robertson case, Thomson settled a copyright infringement action brought by freelance writers for compensation for the publication of their works on electronic databases. Under the settlement, Thomson agreed to pay the class members, who undoubtedly had the copyright in their literary works, $11 million, which after certain deductions including legal fees, was to be distributed to those class members that provided licences. As an alternative to granting the licences and receiving payments under the distributions process, class members could elect to have their works removed from commercially-available electronic databases.
>
> [97] Unlike Robertson, in the case at bar, the Class Members did not receive compensation for their licences but only the satisfaction of

> knowing that Thomson paid $350,000 to benefit a worthy project and $850,000 to Class Counsel.
>
> [98] But more to the point, unlike Robertson, the case at bar was always about the principle and not about the money. In Robertson, the class members' livelihood was to be paid for their literary works, and they sued to earn revenue. In the case at bar, the Class Members make their living as lawyers not as authors, and they sued not for income but for the principle that Thomson should not take what most lawyers would be prepared to give away for free if only politely asked.
>
> [99] Unlike Robertson, where the payment to the class members in exchange for a licence was consistent with the purposes of the class action, in the case at bar, the exchange of a licence was inconsistent with the purposes of the class action, which was never about the money but about the principle that Thomson should not infringe the Class Members' copyrights in court documents. Under this Settlement, Thomson has achieved something that it could not have achieved even by a successful counterclaim; namely, copyright licences and releases of copyright infringement claims by Class Members whose intention was to protect not to be paid for their copyright.

- **Section 13 – Ownership of copyright**

For a copyright assigment to have effect. It must be clear as to the transfer of rights.

Société de développement des entreprises culturelles (SODEC) v. Société Radio-Canada (SRC), 2014 CarswellQue 2051 (Que. Sup. Ct.; 2014-03-12) Petras J.

> [83] En France, seul le titulaire des droits d'auteur, qui dispose un droit réel, peut agir en contrefaçon. Même un licencié exclusif n'a pas les qualités pour agir en contrefaçon car il n'est pas titulaire des droits d'auteur.
>
> [125] Pour prétendre au transfert d'un droit de propriété réel, il faut des termes clairs dans une convention

- **Section 13 – Ownership of copright**

Even in copyright matters, an appeal based on findings of facts will seldom be successfull.

Pinto v. Bronfman Jewish Education Center, 2014 CarswellQue 2135 (Que. C.A.; 2014-03-12) [affirming 2011 QCCS 3458 (Que. Sup. Ct.; 2011-07-13)]

> [1] […] The judge of first instance concluded that Appellant's client was Bronfman Jewish Education Centre, and not Federation CJA nor Tal Am Inc. She concluded that Respondents Shlomo and Tova Shimon did not take advantage of the Appellant. They did not commit themselves to negotiate an agreement with him regarding the payment of royalties. The letters dated June 13 and 14, 2006 were not drafted in order to abusively obtain a waiver from him regarding the payment of royalties but rather to put an end to the interminable discussions they were having regarding this question.

- **Section 13 – Ownership of copyright**

The provisions dealing with ordered engravings, photograph or portrait are applicable to works created before the repeal of subsection 13(2).

Labrecque (O Sauna) v. Trudel (Centre Bellaza, s.e.n.c.), 2014 QCCQ 2595 (Que. Ct. – Small Claims; 2014-03-28) Gervais J.

> [42] Comme le prévoit expressément le 2^{e} paragraphe de l'article 13, c'est la personne qui a commandé la photographie qui est titulaire du droit d'auteur lorsqu'elle a versé une somme d'argent pour l'obtenir. Tel que dit plus haut, la Loi sur la modernisation du droit d'auteur [Fn 3 L.C. 2012, ch. 20] a abrogé ces deux dispositions, mais prévoit aux articles 59 et 60 que ceux-ci demeurent malgré tout en vigueur lorsque vient le temps de déterminer le propriétaire d'un droit, pourvu que la photographie ait été commandée avant l'entrée en vigueur de celle-ci, ce qui est le cas en l'espèce […]
>
> [43] La conséquence en est que, la preuve établissant que la demanderesse a commandé et payé la photographie en 2006, elle est détentrice du droit d'auteur à son égard.

- **Section 13 – Ownership of copyright**

An assignment or grant must be in writing. The effect of a confirmatory assignment is better decided by the trial judge.

Groupe Innomax inc. v. Habitations Rouma inc., 2014 CarswellQue 4059 (Que. Sup. Ct.; 2014-04-03) Picard J.

[10] La concession d'intérêt à laquelle réfère cette disposition [Subsection 13(4)] vise la licence exclusive, par opposition à la simple licence non exclusive [Fn 1 Article 13(7) de la Loi.], laquelle peut être verbale.

[12] Ainsi, d'une part, l'écrit est requis afin de permettre au cessionnaire ou détenteur d'un droit, titre ou intérêt d'exercer son recours; il s'agit d'une exigence de droit substantiel, non pas d'une règle de preuve ou de procédure [Fn 2 Bradale Distribution Enterprises Inc. c. Safety First Inc., (1987) 18 C.I.P.R. 71 (C.S.); Motel 6 Inc. c. No. 6 Motel Ltd., (1981) C.P.R. 44 (C.F.).]. D'autre part, la personne ne détenant qu'une licence non exclusive d'utilisation d'une oeuvre ne possède pas l'intérêt requis afin d'exercer un recours en contrefaçon de droit d'auteur [Fn 3Normand TAMARO*, Loi sur le droit d'auteur, texte annoté,* 9e édition, Carswell, 2012, p. 881].

[27] Ainsi, l'on se retrouve devant une jurisprudence contradictoire: d'un côté, les décisions *Bradale Distribution Enterprises Inc*.[*Bradale Distribution Enterprises Inc. v. Safety First Inc*., (1987) 18 C.I.P.R. 71 (Que. Sup. Ct..)] et *Harmony Consulting Ltd.* [*Harmony Consulting Ltd*. v. *G.A. Foss Transport Ltd.*, 2011 FC 340; affd. (2012 FCA 226], donnant ouverture, dans certaines circonstances, à la reconnaissance de contrats *nunc pro tunc* de cession de droit d'auteur et de l'autre côté, la décision *J.L*. *De Ball Canada Inc*., [J*.L. de Ball Canada Inc. v. 421254 Ontario Ltd.*, 5 C.P.R. (4th) 352 (F.C.T.D.; 1999-12-30] faisant échec au recours introduit par le cessionnaire, fondé sur des violations de droit d'auteur antérieures à la date de signature de la cession *nunc pro tunc*.

[29] Or, vu la jurisprudence contradictoire en matière de cessions de droit d'auteur *nunc pro tunc*, il serait prématuré de mettre fin au recours de G.I., à ce stade-ci, sans lui avoir permis de fournir d'éléments de preuve quant aux circonstances entourant la soi-disant cession verbale de juin 2009 et quant aux intentions du cédant, Gestion Innomax Ltée, à cette date.

- **Section 13 – Ownership of copyright**

Copyright law should not be used as a trap for the unwarry.

Pokora v. 9064-0723 Québec inc., 2014 QCCQ 5697 (Que. Ct. – Small Claims; 2014-05-14) Chicoine J.

> [11] **CONSIDÉRANT QUE,** si tels droit d'auteur ou de copyright peuvent exister en faveur d'un photographe déjà payé pour la prise des photos, encore eût-il fallu que le demandeur les réserve explicitement ou, à tout le moins, qu'il en convienne avec son co-contractant lors de leur convention initiale;

- **Section 13 – Ownership of copyright**

Even in favour of a collective society, an assignement or an exclusive lience must be i) in writing and ii) signed by the copyright owner (or his representative).

Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC) v. National Gallery of Canada (NGC), 121 C.P.R. (4th) 1 (S.C.C. 2014-05-14) Rothstein J. [reversing 2013 CarswellNat 507 (F.C.A.; 2013-03-04), which was reversing 2012 CarswellNat 4332 (C.A.P.P.R.T.; 2012-02-16)]

> [4] Copyrights assigned or exclusively licensed to the collective society must comply with the *Copyright Act* requirement that such assignments or exclusive licences be in writing and signed by the copyright holder or his or her agent (s. 13(4)). Collective societies may set tariffs for the use of such copyrights (ss. 70.1 and 70.13). The Copyright Board is responsible for certifying these tariffs (s. 70.15).

- **Section 13 – Ownership of copyright**

Claiming unemployement benefits implies that the author was an employee and could not claim first ownership of the work he created.

Kennedy v. Ruminski, 2014 CarswellNat 1842 (F.C.; 2014-05-30) Phelan J.

> [23] I find no merit in the Respondent's contention that the relationship at issue was a partnership with a weekly draw.
>
> [24] The Respondent reported his income as employment income for tax purposes and identified the Applicant as his employer. He knew that the Applicant made the necessary source deductions from his weekly pay cheques.
>
> His claim for employment benefits constitutes an admission that at least he saw himself as an employee. This fact, combined with the nature of weekly payments and his characterization of them as

> employment income, is sufficient in this case to establish that he was an employee.
>
> [25] As a result of this finding, s 13(3) of the Act is relevant. It vests copyright in the works created during the course of the Respondent's employment with the Applicant unless there is an agreement to the contrary.
>
> [26] The Memorandum constitutes such an agreement. It governs the respective ownership interests of the Applicant and Respondent in the works created by the Respondent during the course of the employment relationship.

- **Section 13 – Ownership of copyright**

Authorization must be from the copyright owner or his legal representative.

Pokora v. 9064-0723 Québec inc., 2014 QCCQ 5697 (Que. Ct. – Small Claims; 2014-05-14) Chicoine J.

> [5] **CONSIDÉRANT** que dame Berry-Fortin, alors amie du demandeur, n'avait aucune autorité ni mandat pour lier l'une ou l'autre des sociétés défenderesses;

- **Section 13 – Ownership of copyright**

The *Status of the Artist Act* and the *Copyright Act* are not mutually exclusive or contradictory. Establishing a minimum fee for the use of existing works does not affect any of the rights conferred on copyright holders nor do the scale agreements under the *Status of the Artist Act* bind collective societies governed by the *Copyright Act.*

Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC) v. National Gallery of Canada (NGC), 121 C.P.R. (4th) 1 (S.C.C. 2014-05-14) Rothstein J. [reversing 2013 CarswellNat 507 (F.C.A.; 2013-03-04), which was reversing 2012 CarswellNat 4332 (C.A.P.P.R.T.; 2012-02-16)]

> [23] An artists' association's function is to bargain with producers for the fixing of what is analogous to a minimum wage for any artist who may agree to provide his or her artistic work to the producer. Establishing a minimum fee for the use of existing works does not affect any of the rights conferred on copyright holders under s. 3 of the *Copyright Act*. Minimum fees may, in some circumstances, affect whether and under what conditions artists will provide a producer

with the right to use their artistic works, namely preventing an artist from doing so if no producer is willing to offer him or her the minimum amount under the applicable scale agreement. Ultimately, however, the decision of whether or not to provide the right to use an artistic work remains with the copyright holder.

[24] The above interpretation causes no conflict with the *Copyright Act*'s provisions regarding collective societies. As counsel for CARFAC/RAAV acknowledged at the oral hearing, minimum fees for existing works do not apply to or bind collective societies such as SODRAC. Collective societies have the power to determine tariffs for the works in which they hold the copyright, subject to the approval of the Copyright Board. However, the *SAA* [*Status of the Artist Act*, S.C. 1992, c. 33] and the Tribunal precedent are clear, and none of the parties to this appeal disagree: scale agreements do not bind collective societies. The *SAA* only governs the professional relations between federal governmental producers, as defined by that Act, and artists insofar as they choose to retain their copyrights.

[25] Artists therefore have two options when dealing with federal governmental producers for the use of their existing works. One option is to assign or license their copyright to a collective society or appoint that society as their authorized agent. In that case, tariffs set under the *Copyright Act*, and not the *SAA* and any scale agreements for their sector, will apply to the works. The other option is to deal directly with the producer, in which case they will be bound by any applicable *SAA* scale agreements. Within this option, artists may either accept the minimum fees, terms and conditions set out in the scale agreements and model contracts, or they can attempt to negotiate higher fees or more favourable terms.

- **Section 13 – Ownership of copyright**

The provisions of subsection 13(2) must be interpreted restrictively: an infographer is not a photographer.

Flansberry (Kapture Design) v. 6548890 Canada inc. (Turbo Marketing), 2014 CarswellQue 11833 (Que. Ct; 2014-06-01) Lapointe J.

[68] Le procureur de la demanderesse reconventionnelle a consacré beaucoup d'efforts en plaidoirie, à dresser un parallèle entre le rôle moderne de l'infographiste et celui jadis joué par le photographe qui manipulait planches et négatifs. Cette approche privilégierait sa cliente lui conférant le rôle de celui qui commande une œuvre à un

> photographe contre rémunération, comme prévu à l'article 13 (2) L.d.a.
>
> [69] Avec égards, le Tribunal ne peut assimiler les travaux en question à de la photographie. Les dispositions relatives à la photographie commandée par un tiers, sont une exception au principe de l'article 13 (1) L.d.a. en faveur du créateur. Ce régime d'exception doit être interprété restrictivement. (*Lapierre Desmarais c. Edimag inc*. *et Robi*, CAQ, 3 avril 2003, Can LII 17515, paragr. 18 à 20 et 49).

- **Section 13 – Ownership of copyright**

A copyright licence is not a sale of goods.

Leuthold v. Canadian Broadcasting Corporation, 2014 CarswellNat 2246 (F.C.A.; 2014-06-27) Pelletier J. [affirming 104 C.P.R. (4th) 401 (F.C.; 2002-06-14); motion for leave to appeal to the Supreme Court of Canada filed 2014 CarswellNat 3986 (S.C.C.; 2014-09-30)]

> [27] A licence agreement is not a sale of goods; no property in goods is transferred as a result of a licence agreement. All that is conveyed is a right to use the property which is subject to the grantor's copyright in certain ways. Furthermore, an intangible such as an interest in copyright is not a good: see *R. v Cacciatore*, 161 OAC, [2002] O.J. No. 2366, at paragraph 14.
>
> [29] Ms. Leuthold also argues that the Newsworld broadcast was not covered by the Stills Licence because it was in contravention of Newsworld's operating licence which prohibits the simultaneous broadcasting of programming on the CBC "regular" network and on Newsworld. I do not find this argument persuasive, as regulatory practices are not dispositive of copyright issues.

- **Section 13 – Ownership of copyright**

The interpretation of a contract is a matter to be decided under the law of the province.

Planification-Organisation-Publications Systèmes (POPS) Ltée v. 9054-8181 Québec Inc., 124 C.P.R. (4th) 161 (F.C.A.; 2014-07-25) Gauthier J. [varying 111 C.P.R. (4th) 1 (F.C.; 2013-04-25)]

> [39] I agree with the appellants when they indicate in their notice of appeal that the contractual relationships between the parties must be examined in light of the civil law even if certain aspects are also regulated by the *Copyright Act*, R.S.C. 1985, c. C-42 (the Act). It should be noted, however, that the appellants (and the respondents) asked the judge to take into account various decisions issued in common law jurisdictions and that they continue to rely on those decisions in this proceeding. This explains the reference to such authorities in the judge's decision.

- **Section 13 – Ownership of copyright**

A non-exclusive licence may not be revoked at will when the licensee provided consideration.

Planification-Organisation-Publications Systèmes (POPS) Ltée v. 9054-8181 Québec Inc., 124 C.P.R. (4th) 161 (F.C.A.; 2014-07-25) Gauthier J. [varying 111 C.P.R. (4th) 1 (F.C.; 2013-04-25)]

> [45] In my opinion, there is no generally applicable rule of law that would preclude a non-exclusive user licence from being non-revocable when the licensee has provided consideration. Neither the law nor the Act restrict the parties' contractual freedom in this regard. In every case, it is for the trial judge to determine the terms that are implicit in the contract in light of all of the relevant contextual elements in civil law.

- **Section 13 – Ownership of copyright**

When a work is created during the employment, the employer is the owner of the copyright therein**.**

Planification-Organisation-Publications Systèmes (POPS) Ltée v. 9054-8181 Québec Inc., 124 C.P.R. (4th) 161 (F.C.A.; 2014-07-25) Gauthier J. [varying 111 C.P.R. (4th) 1 (F.C.; 2013-04-25)]

> [74] From this perspective and in view of the judge's factual finding that Elizabeth Posada was working for IDP when these lines of code were written and that her job included developing Epsilon and Comex, the rule set out at subsection 13(3) of the Act applied and unless otherwise stipulated, IDP (the employer) was the first owner of the copyright.
>
> [84] Furthermore, it matters little whether Elizabeth Posada is the sole author or one of several authors of Epsilon a.k.a. Comex.

> Indeed, according to Elizabeth Posada's testimony, the 20 lines of code that were written when she was employed by IDP are what distinguish Epsilon from Omega. Therefore, even if she were the sole author of Epsilon, it appears to me that this compilation could only have been created in the context of that employment and at a time when POPS was dormant. Under subsection 13(3) of the Act, IDP is, in the absence of an agreement to the contrary, the first owner of the copyright (see paragraphs 74 to 76 above).

- **Section 13 – Ownership of copyright**

An assignment must be in writing.

Flansberry (Kapture Design) v. 6548890 Canada inc. (Turbo Marketing), 2014 CarswellQue 11833 (Que. Ct; 2014-06-01) Lapointe J.

> [77] L'article 13(4) de la Loi prévoit: «Le titulaire du droit d'auteur sur une œuvre peut céder ce droit, (…)». Plus loin l'article prévoit expressément : «(…) mais la cession ou la concession n'est valable que si elle est rédigée par écrit et signée par le titulaire du droit qui en fait l'objet…».
>
> [78] Rien de tel ne ressort de la preuve. Il n'y eut aucun tel écrit; pas plus qu'un contrat entre les parties régissant l'ensemble de leurs relations, ce qui n'est pas particulièrement troublant en soi. D'ailleurs, l'absence d'écrit rend plutôt vraisemblable la conclusion que le graphiste était un entrepreneur ou prestataire de service dans un créneau singulier, régit par les dispositions sur les contrats d'entreprise et de service (articles 2098 et suivants C.c.Q).
>
> [79] Dans un tel contexte, l'absence de cession par écrit est fatale à celui qui se veut propriétaire de l'œuvre d'un autre qui lui est le créateur artistique de l'ouvrage au sens des droits d'auteur.

- **Section 13 – Ownership of copyright**

The contractual provisions of *An Act Respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature, and Their Contracts with Promoters* are of public order.

Vanasse v. Éditions du Grand Duc, une division de Groupe Éducalivres inc., 2014 CarswellQue 8497 (Que. Sup. Ct.; 2014-07-2) Messier J

> [35] L'article 42 [de la *Loi sur le statut professionnel des artistes des arts visuels, des métiers d'art de la littérature et sur leurs contrats avec les diffuseurs,* RLRQ c S-32.01], précise qu'à l'exception des paragraphes 35 et 37, les autres de ce chapitre, soit 30 à 41 sont d'ordre public. Les débats à ce sujet indiquent; «M. Brière: Même si l'artiste acceptait la non-conformité, il serait considéré comme inexistant en droit.»
>
> [36] Donc la *Loi S-32.01* a un but de protection de l'artiste qui s'étend à la protection des écrivains d'œuvres scientifiques, afin d'inclure les paragraphes 30 à 42 aux avantages d'un contrat individuel qui devra respecter certains paramètres.

- **Section 13 – Ownership of copyright**

When a work is not created in the course of employment, the employee remains the first owner of the copyright.

Mejia v. LaSalle College International Vancouver Inc., 2014 CarswellBC 2454 (B.C. S.C.; 2014-08-18) Cohen J.

> [207] The plaintiff was hired by LaSalle as an instructor and not as a photographer. While an instructor "proceeding generally about his master's affairs" could possibly be engaging in a wide variety of activities, whether paid or unpaid, I do not view the taking of photographs to be an example of such an activity. In the circumstances of this case, the taking of photographs was not an activity that was generally considered to be within the duties of the plaintiff instructor, and there was no contractual agreement that he do so. Though the photograph is connected with the employer LaSalle by virtue of its subject and the location in which it was taken, I do not view it as being connected with the plaintiff's employment.
>
> [208] I find, therefore, that the photograph was not made in the course of the plaintiff's employment with LaSalle and, as such, s. 13(3) of the *Copyright Act* does not apply. I find, pursuant to s. 13(1) of the *Copyright Act*, that the plaintiff is the first owner of the copyright of the photograph in question.

- **Section 13 – Ownership of copyright**

The assignment of copyright must be in writing but not the rigfht to sell copyrighted material.

Wanless v. Mayfair Music Publications Inc., 2014 CarswellOnt 12291 (Ont. Sup. Ct.; 2014-09-08) André J.

> [18] Counsel for Mr. Loweth contends that it is pointless to grant Ms. Wanless' motion to amend her statement of claim, given that, by virtue of section 13(4) of the *Copyright Act* ("the *("*Act"), the agreement between Ms. Wanless and the late John Loweth had to be in writing in order to be valid.
>
> [19] I disagree. Section 13(4) of the Act indicates that any *assignment* of a copyright must be in writing to be valid. The section does not state that an agreement between two persons in which one gives the other the right to sell copyrighted material must be in writing. To that extent, Ms. Wanless' oral contract with John Loweth is not invalid.

- **Section 13 – Ownership of copyright**

He who received a plagiarized expert report may obtain the reimbursement of what he paid.

Hendricks v. Wayne Arendse & JBC International Forensic Solutions, [2014] O.J. 4702 (Ont. Sup. Ct. Small Claims; 2014-09-29) Klein D.J.

> [18] Ultimately, [the expert] Vormbaum concludes:
>
> *Based on the information … it would appear that large parts of the "QUALITY ASSURANCE MANUAL -- VLTS" written by* [the defendant] *Wayne Ardendse and submitted to KeSystems by Shaun Hendricks has been copied verbatim from information available on the Internet.*
>
> *The fact that so much of the manual has been copied form copyrighted material makes the valuation of the quality manual as prepared by Wayne Arendse a pointless exercise as it is the considered opinion of KeSystems that this work has been plagiarized and is of no commercial value whatsoever and use of this manual in any marketing or proposal activities by Hendricks could have exposed him and or his venture to*

> *significant legal costs and potentially ruinous damage to the reputation of himself and his business.*
>
> [19] The court questions the necessity of a $33,800 quality assessment system. When it boils down to it, this court finds that the cost far exceed what was truly required. The price was way out of whack and there are serious questions surrounding the validity of the Arendse's work This was not only outlined in the Vormbaum report, but became quite apparent, in a simple read of the comparisons between the Arendse's report and those readily found on the Internet. Arendse's stated that all reports use a standardized form of language, but what can be seen in his assessment report is beyond just a matter of standard language. Again, as indicated, the court accepts the findings and opinion of Mr. Vormbaum.

- **Section 13 – Ownership of copyright**

Copyright ownership may be inferred from the relation between the parties, irrespective of any writing [but, fortunately, the case is in appeal!].

Roulottes Prolite inc. v. Lasanté, 2014 CarswellQue 10221 (Que. Sup. Ct.; 2014-10-03) Caron J. [in appeal]

> [19] La deuxième facture [Fn6 Pièce P-6.] a été émise le 20 mai 2004 et cette fois-ci, on y indique: *Conception d'un site Web : 400,00 $*.
>
> [20] Le total de la facture s'élève à 570 $ et au bas de la facture, tout comme on le constate sur les autres factures, il y est précisé: *Ce reçu confirme votre achat de produit et de service.*
>
> [30] C'est donc huit ans après la création du site Web que James réalise que Lasanté se comporte comme propriétaire du site Web. Le Tribunal rappelle qu'aucun document n'a été échangé entre les parties quant au fonctionnement du site Web et les seuls documents échangés sont les factures émises par l'entreprise de Lasanté et les informations concernant le contenu du site Web.

> [31] James a toujours cru, en payant les factures et vu le contenu de celles-ci, qu'il s'agissait du site Web de son entreprise et à l'occasion, il indiquait à Lasanté certains commentaires ou formulait des demandes pour retirer une publicité qui pouvait être négative à la demanderesse.
>
> [32] En somme, la demanderesse payait les factures soumises par Lasanté et n'avait aucune raison de croire que le site Web n'était pas sa propriété. Le contenu des factures émises par Lasanté corrobore la version des faits donnée par James.
>
> [33] Lasanté a expliqué au Tribunal que le site Web était sa propriété parce que le site était sa conception et qu'il en était propriétaire, notamment en raison des protections offertes par la *Loi sur le droit d'auteur*. Pourtant, le 20 mai 2004, Lasanté a transmis à James une facture référant spécifiquement à la conception du site Web.

> [41] La solution du litige réside dans la relation contractuelle des parties à la fin 2003 et au début 2004 et non dans l'interprétation de la *Loi sur le droit d'auteur*. À cette époque, les témoignages de James, Lasanté et du témoin Miron confirment que la volonté de James était de créer un site Web pour son entreprise et en aucun temps les faits et gestes de James laissent croire qu'il avait accepté de laisser la propriété du site à Lasanté ou son entreprise.

- **Section 13 – Ownership of copyright**

An assignment cannot be the basis for an action for an infringement that occured prior to the assignment.

Denturist Group of Ontario v. Denturist Association of Canada, 2014 CarswellNat 4191 (F.C.; 2014-10-16) Manson J.

> [68] However, I agree with the Applicant that written copyright assignments that post-date this application cannot form the basis of an action for infringement except in respect of infringing activities occurring after the date of the effective written assignments (*JL De Ball Canada Inc v 421254 Ontario Ltd* (1999), 1999 CanLII 9222 (FC), 179 FTR 231 at para 24).

- **Section 19 – Right to remuneration – Canada**

The right to an equitable remuneration for makers and performers of sound recordings is subject to the eligibility conditions set forth by section 20.

Re: Sound v. Fitness Industry Council of Canada, 120 C.P.R. (4th) 287 (F.C.A.; 2014-02-24) Evans J.

> [28] Subection 19(1) creates a right to an equitable remuneration for makers and performers of sound recordings when performed in public. In order to produce the funds required to provide an equitable remuneration, those who perform the recordings in public are liable to pay royalties to the collective society authorized to collect them. Subsection 20(1) sets out the eligibility criteria for equitable remuneration and the conditions under which the right applies: the maker of a sound recording must be a Canadian citizen or a permanent resident (or, in the case of a corporation, have its headquarters in Canada), or the fixations for the recording must have occurred in Canada.

- **Section 19 – Right to remuneration – Canada**

Only a collective society can collect the equitable remuneration.

Public Performance of Sound Recordings, Re [Re:Sound No. Tariff 8 – Non-interactive and semi-interactive webcasts, 2009-2012], 2014 CarswellNat 1577 (Cop. Bd.; 2014-05-16)

> [7] Streaming music over the Internet can involve as many as six rights or sets of rights. [Fn7 For a fuller description of these rights and of the collective societies that administer them, see *Commercial Radio Tariff (SOCAN: 2008-2010; Re:Sound: 2008-2011; CSI: 2008-2012; AVLA/SOPROQ: 2008-2011; Artistl: 2009-2011)* (9 July 2010) Copyright Board Decision at paras. 8 to 13. *[Commercial Radio (2010)]*. These proceedings only concern the equitable remuneration to which performers and makers are entitled when a published sound recording of a musical work is communicated to the public by telecommunication. [Fn8 *Act*, s. 19(1)] These two rights [Fn9 The issue was settled in *Neighbouring Rights Collective of Canada v. Society of Composers, Authors & Music Publishers of Canada*, 2003 FCA 302, [2004] 1 F.C.R. 303 (F.C.A.) at para. 11. See *also Act*, s. 23(2] always trigger a single payment for any type of sound recording; in the case of sound recordings of musical works, that payment is always made to a collective society authorized by the Board to collect it. [Fn10 *Act*, ss. 19(2)(*a*), 68(2)(*a*)(iii).] Re: Sound

administers these rights for the vast majority of eligible performers and makers.

- **Section 20 - Conditions-Canada [right to remuneration]**

The maker's place of residence at the date of first fixation is a condition of eligibilty to receive equitable remuneration for a recording.
Re: Sound v. Fitness Industry Council of Canada, 120 C.P.R. (4th) 287 (F.C.A.; 2014-02-24) Evans J.

> [118] Finally, Re:Sound says that the Board erred in law by reading into section 20 an additional eligibility requirement, namely that makers or performers can only receive equitable remuneration for a recording for which they have appointed a collective society to act for them. Again, I do not agree.
>
> [119] Requiring a performer or maker to sign up a recording with a collective society before being able to receive equitable remuneration is not of the same character as the eligibility conditions in section 20, namely, the maker's place of residence at the date of first fixation, or where the fixations occurred. These cannot be changed after the recording has been made and determine whether equitable remuneration is ever payable in respect of a particular recording. In contrast, makers or performers of recordings may at any time authorize a collective society to act on their behalf in respect of a recording. Moreover, as already noted, signing up with a collective society is hardly an onerous requirement.

- **Section 27 – Infringement generally**

What is on the Internet is not free to use.

Labrecque (O Sauna) v. Trudel (Centre Bellaza, s.e.n.c.), 2014 QCCQ 2595 (Que. Ct. – Small Claims; 2014-03-28) Gervais J.

> [48] Le fait que les défendeurs aient pu mettre la main sur cette photographie par l'intermédiaire du moteur de recherche Google sur Internet vient-il alors changer le droit dont jouit madame Labrecque?
>
> [49] On serait sans doute à première vue tenté de le penser vu la grande démocratisation de l'information qu'amène Internet.

> [50] On y trouve en effet une quantité phénoménale de données incluant des images qui, pour la plupart, n'indiquent pas être protégées par un droit d'auteur quelconque.
>
> [51] De l'avis du Tribunal, penser ainsi aurait comme effet de pouvoir bien facilement contourner les dispositions législatives à ce sujet, de telle sorte que dès le moment où une œuvre est disponible sur Internet, elle échapperait au domaine juridique de la propriété intellectuelle.

- **Section 27 – Infringement generally**

In the world of education, plagiarism is a serious matter but sanctions must be graduated.

Syndicat des professeur(e)s de l'Université du Québec à Montréal [Le] v. L'Université du Québec à Montréal, 2014 CanLII 16661f (2014-04-10) Gagnon, arbitrator

> [113] Le plagiat ne saurait être toléré de la part d'un enseignant. L'on ne saurait en effet tolérer que les titulaires de cette fonction s'adonnent eux-mêmes à des abus de cette nature ou à d'autres qui sont interdits aux étudiants. […]
>
> [114] […] Les professeurs doivent en quelque sorte servir de modèles aux étudiants. L'institution où ils exercent leurs fonctions ne saurait tolérer la pratique du plagiat de leur part. S'il en était ainsi, les étudiants pourraient avoir le sentiment qu'ils peuvent eux aussi avoir recours à des abus de cette nature, sans craindre que des mesures qui leur soit défavorables soient prises par l'institution d'enseignement qu'ils fréquentent.
>
> [120] Tel que mentionné auparavant la preuve produite au cours des séances arbitrales permet d'affirmer que le demandeur a agi de façon inacceptable en reprenant dans son livre certains textes contenus dans les ouvrages des auteurs Marceau et Tremblay, sans mentionner leur origine. Cette façon d'agir constitue du plagiat. Un professeur d'université qui plagie d'autres personnes dans une de ses publications commet en réalité une faute grave.

- **Section 27 – Infringement generally**

Knowledge is an essential element to be proved for secondary infringement.

Sandhu Singh Hamdard Trust v. Navsun Holdings Ltd, 2014 CarswellNat 4989 (F.C.; 2014-11-26) McVeigh J.

> [110] The Plaintiff's passing-off claim against the defendant Master Web fails. Similarly, the copyright claim is dismissed against the defendant Master Web as Master Web had no knowledge of any allegedly infringing activity and the copyright settlement is a complete defense to the claim.

- **Section 29 – Research, private study, etc.**

All free trials are not covered by the exception of fair use.

Public Performance of Musical Works, Re [SOCAN Tariffs 22.D.1 –Audiovisual webcasts and 22.D.2 –Audiovisual user-generated content for theyears 2007 to 2013], 2014 CarswellNat 2616 (Cop. Bd. 2014-07-18) the Board

> [57] Netflix argued that royalties on free trials are a violation of the Supreme Court principle of technological neutrality established in ESA. We do not agree.
>
> [58] The principle of technological neutrality is that, since only the reproduction right is triggered when a CD is sold in a store, only the reproduction right should be triggered when a digital album is sold online. The CD is an alternative technology to the digital download. There is no alternative-technology equivalent to a Netflix free trial. Video stores never offered a free month's membership with the right to rent as many videos as the customer wanted for no additional charge. Thus, there is no issue with technological neutrality
>
> [59] Netflix also wanted the Board to find that the free trials are fair dealing in the same way that the Board found that free previews are fair dealing. We decline to do so, for several reasons.
>
> [60] First, the analogy between free previews and free trials is weak. In a free preview, the customer can hear a portion of a musical work in a degraded format. In a free trial, the customer can hear complete musical works, to the extent that such works are fixed in the audiovisual work being watched.
>
> [61] Second, it is not altogether clear that Netflix is the only provider that offers free trials. When the Board was examining the free previews offered by iTunes, it was possible to argue that iTunes was the dominant provider of permanent downloads. Thus, in examining

> the practices of iTunes, the Board was essentially examining the practices of the permanent-download industry. However, in the case of Netflix, it is not clear that they dominate the market for videos. Without the argument of market dominance, an analysis of Netflix's policy of free trials would necessarily be incomplete with respect to the overall video industry.
>
> [62] Third, and equally importantly, we do not have the evidentiary base with which to make that decision. While we could delay this decision for several more months during which time we would be collecting evidence from the parties on this issue, the fact that Netflix declined to participate in the process for many months is sufficient reason for us to decline to do so. If Netflix now wants to argue that it does not owe anything for its free trials, the appropriate forum in which to do so is not the Board.

- **Section 29.2 – News Reporting**

Using a photograph to illustrate a news report on a matter of public interest may be fair use.

Messier v. Le quotidien La Presse, 2014 CanLII 23871 (Que. Conseil de presse du Québec – Comité des plaintes; 2014-03-21)

> 25] Selon les plaignants, la photo accompagnant l'article est un choix éditorial tendancieux visant à faire mal paraître M. Lesage. Ils soutiennent qu'il existe des photos plus avantageuses de M. Lesage. Ils soulignent également que la photo a été prise sur la page Facebook de M. Lesage sans son consentement, ce qui constituerait une violation de la propriété intellectuelle.
>
> [26] Me Bourbeau de *La Presse* soutient que l'usage d'une photographie tirée d'une page Facebook constitue une utilisation équitable au sens de la *Loi sur le droit d'auteur* et ne constitue pas une violation de droits d'auteur. Il précise que le guide de déontologie du Conseil de presse prévoit que la liberté de presse et le droit du public à l'information autorisent les médias à choisir et diffuser les photographies qu'ils jugent d'intérêt public et que ceux-ci doivent conserver leur entière liberté rédactionnelle en la matière. Il ajoute que c'est M. Lesage qui a choisi cette photographie comme image principale pour son profil Facebook.
>
> [27] Le Conseil constate que la photo du profil Facebook de M.Lesage était publique, sélectionnée par lui-même et accessible à

> tous. L'intérêt public du reportage justifiait sa diffusion. Par ailleurs, il n'est pas de la compétence du Conseil de se prononcer sur la *Loi sur le droit d'auteur.*
>
> [28] Le Conseil rejette le grief pour partialité.

- **Section 34 – Copyright [civil remedies]**

Even if the award of costs is discretionnay, any decision not to grant same shall be motivated.

Lachance v. Productions Marie Eykel inc., 2014 CarswellQue 637 (Que. C.A.; 2014-01-30), the Court [confirming 2012 CarswellQue 5028 (Que. Sup. Cté.; 2012-03-15)]

> [18] Leur deuxième moyen veut que la juge aurait erré dans son dispositif en concluant au rejet de l'action de l'appelant, sans frais, puisqu'elle a omis de préciser pourquoi. En dépit de la règle générale qui veut que la partie perdante paie les dépens de celle qui a gain de cause, l'article 477 *C.p.c.* permet au juge du procès d'y déroger, mais il doit se justifier. En l'espèce, le silence de la juge permet à la Cour de substituer son avis au sien [Fn 9 *Constructions Pépin et Fortin inc. c. Résidence des Bois-Francs inc.*, A.J.Q./P.C. 1999-1273 (C.A.); *Lauzon c. Québec (P-G)*, 2010 QCCA 1239].
>
> [19] Bien que la juge ait omis de motiver sa conclusion sur les dépens, un examen de l'ensemble des circonstances dans lesquelles s'est déroulé le procès permet de comprendre pourquoi elle a choisi de ne pas les accorder aux intimées. De surcroît, ce n'est que durant le procès qu'il est devenu apparent que l'intervenante finançait le litige au profit des intimées qui, de ce fait, n'ont rien eu à débourser.

- **Section 34 – Copyright [civil remedies]**

The burden to prove the infringement lays upon the plaintiff.

Chayer v. Messier, 2014 CarswellQue 860 (Que. Ct.; 2014-01-27) Coutlée J.

> [8] Le demandeur fonde sa réclamation contre ces deux défendeurs sur l'inaction de ces dernières à enlever les trois photos contenues dans les deux sites Internet du défendeur Éric Messier hébergé par elles.

> [9] En ce qui a trait à la défenderesse Godaddy.com, la preuve démontre que cette dernière a suspendu le site du défendeur Éric Messier du moment que le demandeur a signifié que ses droits d'auteurs avaient été violés. Le même jour, soit le 28 décembre 2009, la défenderesse adressait un avis au défendeur Éric Messier pour qu'il retire ces photos. En témoignage, le défendeur Éric Messier affirme l'avoir fait le même jour et produit un courriel de confirmation de la défenderesse (D-2). Le site du défendeur Éric Messier a été remis en ligne suite à ce retrait.
>
> [10] Le demandeur soutient que, dans les faits, les photos n'ont jamais été retirées. C'est à ce dernier qu'appartient le fardeau d'en faire la preuve. Le demandeur produit une série de courriels et d'accusés de réception de la défenderesse Godaddy.com. Cela ne prouve rien. Il eu été facile d'imprimer la page Web du défendeur avec une date postérieure au 28 décembre 2009. En l'absence d'une telle preuve, le demandeur ne s'est pas relevé de son fardeau de preuve. Sa réclamation est rejetée quant à la défenderesse Godaddy.com.

- **Section 34 – Copyright [civil remedies]**

Conditions of issuance of a *Norwich Order.* The Court must weigh and balance the privacy rights of potentially innocent users of the internet versus the right of copyright holders to enforce their rights.

Voltage Pictures v. Doe, 119 C.P.R. (4th) 232 (F.C.; 2014-02-20) Alto, Prothonotary

> [133**]** Having considered all of the evidence of the parties, their submissions and the jurisprudence, there is a number of principles to be gleaned. These principles are in addition to the tests to be applied from *BMG* [*BMG Canada Inc. v. Doe,* 2005 FCA 193]. The Court should give consideration to these principles to weigh and balance the privacy rights of potentially innocent users of the internet versus the right of copyright holders to enforce their rights. The Court ought to balance these rights in assessing the remedy to be granted. Where evidence suggests that an improper motive may be lurking in the actions of a copyright holder plaintiff, the more stingent the order. However, it would only be in a case where there was compelling evidence of improper motive on behaif of a plaintiff in seeking to obtain information about alleged infringers that a Court might consider denying the motion entirely. The *Copyright Act* engages the Court to enforce copyright and the rights that go with the creation of copyrighted works. Absent a clear improper motive the Court should not hesitate to gravide remedies to copyright holders whose works have been infringed.

[134] In summary, the following is a non-exhaustive list of considerations which flow from cases in the U.S., UK. and Canada:

a) The moving party must demonstrate a *bonafide* case;
b) Putting safeguards in place so that alleged intiingers receiving any "demand" letter from a party obtaining an order undcr Rule 238 or a *Norwich* Order not be intimidated into making a payment without the benefit of understanding their legal rights and obligations;
c) When issuing a *Norwich* Order the Court may retain the authority to ensure that it is not abused by the party obtaining it and can impose ternis on how its provisions are carried out;
d) The party enforcing the *Norwich* Order should pay the legal costs and disbursements of the innocent third-party;
e) Specific warnings regarding the obtaining of legal advice or the like should be included in any correspondance to individuals who are identified by the *Norwich* Order;
f) Limiting the information provided by the third party by releasing only the naine and residential address but not telephone numbers and e-mail addrcsscs;
g) Ensuring there is a mechanism for the Court to monitor the implementation of the *Norwich* Order;
h) Ensuring that the information that is released remains confidential and not be discloscd to the public and be used only in connection with the action;
i) Requiring the party obtaining the order to provide a copy of any proposed "demand" letter to a11 parties on the motion and to the Court prior to such letter being sent to the alleged infringers;
j) The Court should reserve the right to order arnendments to the demand letter in the event it contains inappropriate statements;
k) Letters sent to individuals whose naines are revealed pursuant to Court order must make clear that the fact that an order for disclosure has been made does not mean that the court has considered the merits of the allegations of infringement against the recipient and made any funding of liability;
l) Any demand letter should stipulate that the person receiving the letter may not be the person who was responsible for the infringing acts;
m) A copy of the Court order, or the entire decision should be included with any letter sent to an alleged infringer; and,
n) The Court should ensure that the remedy granted is proportional.

- **Section 34 – Copyright [civil remedies]**

Damages for copyright infringement are suffered at the place where the head office is located. It is the effect of the infringing acts that shall be considered, not how the infringement was orchestred.

Filosofia Éditions inc. v. Entreprises Foxmind Canada ltée, 2014 CarswellQue 1554 Que. C.A.; 2014-02-28) [affirming 2013 CarswellQue 5393 (Que. Sup. Ct.; 2013-06-07)]

> [7] Il faut comprendre que ce ne sont pas les activités propres aux entreprises appelantes sur les territoires étrangers qui sont en soi un facteur de rattachement, mais bien leur interaction avec celles de la mise en cause et l'impact que cela pourrait avoir sur les activités de cette dernière en territoire québécois.
>
> [8] En d'autres termes, ce ne sont pas tant les ventes réalisées à l'étranger par les diverses sociétés commerciales qui importent, mais plutôt leurs conséquences au Québec sur la situation économique de la mise en cause en raison de la structure corporative mise en place par M. Capon.
>
> [9] Bref, ce sont ces impacts qui permettent ici de conclure à un lien de rattachement suffisant, impacts qui vont bien au-delà de la simple comptabilisation du préjudice monétaire au Québec.

- **Section 34 – Copyright [civil remedies]**

Conditions for the issuance of an interim injunction: clear prima facie right must be established, irreperable harm must be shown, and the balance of inconvenience must favour the plaintiff.

***G**overning Council of the University of (Toronto) v. Canadian Copyright Licensing Agency,* 2014 CarswellOnt 1940 (Ont. Sup. Ct.; 2014-02-04) Maranger J

> [4] I have applied the test to the facts of this case and would dismiss U of T's motion for an interim injunction for the following reasons:
>
> - The interim injunction will finally dispose of the issue in dispute. The motion seeks a mandatory order and the order sought involves the interpretation of contractual terms. As a consequence the standard applicable here is that of a "strong *prima facie* case". A strong *prima facie* case has been described as "clearly right and almost certain to be successful at trial". *Barton –Reid Canada Ltd. v. Alfresh Beverages Canada Corp.* [2002] O.J. No. 4116 para 9.
>
> - U of T relies on its interpretation of the licensing agreement, suggesting that there was an implied term that Access Copyright could not use this material in the manner that they are attempting in this case. While U of T has a valid argument it

is not one that convinces me that they are "clearly right and almost certain to be successful at trial." They have not demonstrated a strong *prima facie* case.

- I am not satisfied that U of T has shown that it will suffer irreparable harm if the interim injunction is not granted. A change in the Board rates for the years 2011 to 2013, which is the subject matter before the Board, will never directly affect U of T. U of T submitted that the use of this information before the Board may hypothetically affect it by the setting of rates in future years. This calls for speculation and conjecture and is not evidence to support the proposition that U of T will suffer irreparable harm if the injunction is not granted.

- Finally, on a balance of convenience the respondent would suffer more prejudice by not being able to use this information before the Board than U of T would suffer if the respondent uses the information

- **Section 34 – Copyright [civil remedies]**

In the settlement of a class action, the extra-judicial costs must be in relation to the result of the settlement.

Waldman v. Thomson Reuters Canada Limited, 120 C.P.R. (4th) 127 (Ont. Sup. Ct.; 2014-03-04) Perell J

> [117] The benefits of the settlement to class members and the benefit of class actions to class counsel are always interrelated matters. In *Lavier v. MyTravel Canada Holidays Inc.*, 2013 ONCA 92, reversing 2012 ONSC 1673, the Court of Appeal ruled that I erred in awarding class counsel a fee that was grossly disproportionate to the benefit and access to justice obtained by the class, which had only taken up a very small portion of the settlement funds, the balance of which reverted to the defendant.
>
> [118] In the case at bar, the court should have been afforded the option of reducing the Counsel Fee as it thought appropriate and then approving the Settlement Agreement. For settlement approval purposes, better still is the situation where the court has the option of reallocating a portion of class counsel's fee to enhance the benefits of class members. The court was provided with that option in *Smith v. National Money Mart*, 2010 ONSC 1334; aff'd 2011 ONCA 233, where I approved the settlement and reduced class counsel's fee.

> [119] I would have not exercised these options in the case at bar because I think the Settlement Agreement is not fair to the Class, but the court should have been given the option, and the Settlement cannot be approved for this reason alone.

- **Section 34 – Copyright [civil remedies]**

No injunction to issue if it is more likely that the infringement will not occur again.

Société canadienne des auteurs compositeurs et éditeurs de musique c. 9004-1922 Québec inc. (Bar-Asserie), 2014 QCCS 1512 (Que. Sup. Ct.; 2014-03-31) Morrison J.

> [47] Vu l'absence de débat juridique, au moins selon la preuve, le Tribunal est d'avis qu'une injonction n'est pas nécessaire et n'est pas appropriée à ce stade. De plus, une injonction pour l'avenir ne devrait pas être ordonnée par le Tribunal simplement comme pénalité pour le passé.

- **Section 34 – Copyright [civil remedies]**

Plagiarism could lead to the lost of administrative benefits.

Decision No. 936/14, 2014 ONWSIAT 1332 (Ont. Workplace Safety and Insurance Appeals Tribunal; 2014-06-18) Josefo, vice-chair

> [21] There were various documents pertaining to the worker's purported plagiarism of materials while attending LMR, which plagiarism ostensibly continued despite the worker having been explained about what this was, why it was serious, and warned not to continue with this practice. The worker, when I referenced these documents, stated that he "did not want to fail", yet he denied plagiarizing material. He claimed that he only had looked at the dictionary, denied copying from it, and stated that he really was not involved in plagiarism.
>
> [55] In addition to the Adjudicator's detailed memos, pursuant to the voluminous LMR portion of the file, I also have reports from the service provider. The May 27, 2010 progress report described the worker's ongoing breach of the service provider's plagiarism policy. The worker initially received a verbal warning on May 4, 2010 "after he attempted to take credit for writing sentences that had been

> copied directly from a dictionary". The May 27, 2010 report clearly indicates that the worker was told that this was not acceptable, and the plagiarism policy was explained to him in some detail. The worker apparently told his instructor that he understood the significance of this issue and that it would not be repeated

- **Section 34 – Copyright [civil remedies]**

The award of costs is for the Court's discretion.

Planification-Organisation-Publications Systèmes (POPS) Ltée v. 9054-8181 Québec Inc., 124 C.P.R. (4th) 161 (FCA; 2014-07-25) Gauthier J. [varying 111 C.P.R. (4th) 1 (FC; 2013-04-25)]

> [87] The allocation of costs is a discretionary decision of the judge.

- **Section 34 – Copyright [civil remedies]**

Court's discretion as to costs: the non acceptance of a reasonable offer may trigger double costs, irrespective of the financial situation of the party who refused the offer.

Leuthold v. Canadian Broadcasting Corporation, 2014 CarswellNat 2246 (F.C.A.; 2014-06-27) Pelletier J. [affirming 2012 CarswellNat 4204 (F.C.; 2012-10-29); motion for leave to appeal to the Supreme Court of Canada filed 2014 CarswellNat 3986 (S.C.C.; 2014-09-30)]

> [3] An order of costs is a discretionary order and should not be disturbed unless the court below has erred in principle or the costs award is plainly wrong: see *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at paragraph 247.
>
> [8] I agree with the Trial Judge's comments on risk assessment. I might add that in this case, Ms. Leuthold developed a very technical argument in support of an amount which she could never have negotiated in the course of business. No one, under any circumstances, would have paid Ms. Leuthold twenty million dollars for the right to broadcast her images six times over a national network. In assessing her risk, Ms. Leuthold was bound to consider if the position she was taking made commercial sense. Had she done so, she might have viewed the CBC's offer in a different light. As a result, I do not believe that the fact that Ms. Leuthold recovered an

amount in the general area of the CBC's offer is of any assistance to her.

[9] Ms. Leuthold then argues that the Trial Judge, had he decided not to award double costs, should have awarded her costs as the successful litigant. Ms. Leuthold, unfortunately, is engaged in wishful thinking. The Rules provide for the making of a formal offer of settlement with cost consequences if the offer is not accepted. That is what happened here. It does little good to argue after the fact that no effect should be given to Rule 420.

[10] Ms. Leuthold argues that the law is clear that costs are not to be used to penalize a party, nor are they to be punitive or crippling in nature. She argues that an award of costs of some $80,000 is punitive and a penalty for a person whose gross annual income is approximately $20,000 per year.

[11] I agree with Ms. Leuthold's statements of principle but those principles have to be applied in light of the objective sought to be achieved through Rule 420, which is to deter parties from incurring costs and inflicting them on others by creating a financial incentive to compromise their claims. The incentive, in the case of the double costs rule, is the avoidance of a penalty. I do not think it is contentious to say that doubling the costs a party would otherwise have to pay, or imposing costs on a modestly successful party, is a penalty. As a result, it does not assist Ms. Leuthold to say that costs should not operate as a penalty. Costs should not operate as a penalty unless the Rules specifically intend them to do so.

[12] Ms. Leuthold argues that, having regard to her financial circumstances, an order for costs of $80,000 is punitive. It is true that an impecunious claimant with a meritorious claim should not be prevented from bringing his or her claim by an order for security for costs, or advance costs : see *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at paragraph 36 and following. However, once a matter has proceeded to trial and judgment has been rendered, a party's impecuniosity is not a relevant factor in the assessment of costs. The person entitled to costs has had to incur the costs of proceeding to trial and has the right to be compensated within the limits prescribed by the Rules of Court. Issues of enforceability are distinct from issues of entitlement.

[13] Finally, Ms. Leuthold argues that an order of costs ought not to be such as to bring the administration of justice into disrepute. Once again, this is an argument based on impecuniosity. The sad fact of the matter is that litigation produces winners and losers; that is why it

> is such a blunt tool in the administration of justice. But justice is not served by allowing persons who have imposed costs on others by pursuing or defending a claim which lacks merit to avoid the consequences of their behaviour. Such a policy would be more likely to bring the administration of justice into disrepute than the result in this case.

- **Section 34 – Copyright [civil remedies]**

No interlocutory injunction if irreperable harm not proven.

Geophysical Service Incorporated v. Canada-Nova-Scotia Offshore Petrolium Board, 2014 CarswellNat 2186 (F.C.; 2014-05-09) Annis J.

> [38] Accordingly, I conclude that the applicant must demonstrate by clear and non-speculative evidence that it will suffer irreparable harm, not compensable in damages, between now and the outcome of the trial if the injunction is not granted.

- **Section 34 – Copyright [civil remedies]**

Interlocutory injuction refused if Plaintiff does not show a clear right.

Diffusion Dimedia inc. v. Librairie Renaud-Bray inc., 2014 CarswellQue 5833 (Que. Sup. Ct; 2014-06-12) Gouin J

> [24] L'article 5 du *Règlement* [*Règlement sur l'importation de livres* RLRQ, c. D-8.1 (le «*Règlement*»)] permet d'ailleurs un tel autre approvisionnement, lorsque le distributeur exclusif n'est pas en mesure de respecter, dans les 60 jours de sa réception, la commande de livres en français importés d'Europe mais non en stock au Canada, ce qui était le cas dans la présente affaire.
>
> [25] Or, il est très clair qu'il ne sert à rien pour Renaud-Bray, depuis la Date de cessation, de placer des commandes de livres du Catalogue auprès de Dimedia, car cette dernière ne les accepte tout simplement plus.
>
> [26] D'un autre côté, Dimedia dit être en mesure de livrer toute telle commande, mais c'est plutôt Renaud-Bray qui l'empêche de le faire, vu le non-paiement de la Dette et le Différend qui les oppose.

[27] Or, c'est là que le bât blesse.

[28] En refusant toute commande de livres du Catalogue provenant de Renaud-Bray, Dimedia a clairement indiqué que le délai de 60 jours prévu au *Règlement* ne serait pas respecté, permettant par le fait même l'importation de livres du Catalogue auprès d'autres sources d'approvisionnement.

- **Section 34 – Copyright [civil remedies]**

What are the connecting factors for a Canadian court to have jurisdiction?

Jules Jordan Video inc. v. 144942 Canada inc., 2014 CarswellQue 6977 (Que. Sup. Ct; 2014-07-15) Gouin J.

[54] Dans l'arrêt *Lépine* [Fn35 *Société canadienne des postes c. Lépine*, 2009 CSC, paragr. [36]; voir aussi *Iraq (State of) c. Heerema Zwijndrecht*, b.v., 2013 QCCA 1112, paragr. [13]; Gérald GOLDSTEIN, *Compétence internationale indirecte du tribunal étranger*, Droit international privé, coll. JurisClasseur Québec, Montréal, LexisNexis, à jour au 1er janvier 2012, pp. 11 - 14.], le juge Le Bel écrit que l'article 3164 *C.c.Q.* établit comme « condition fondamentale de la reconnaissance d'un jugement étranger au Québec, l'existence d'un lien important entre le litige et le tribunal d'origine. Les articles 3165 à 3168 énoncent ensuite de manière plus spécifique les facteurs de rattachement permettant de conclure à un lien suffisant entre le litige et l'autorité étrangère dans certaines situations ».

[55] Ainsi, si l'un des facteurs énoncés à l'article 3168 *C.c.Q*. trouve application, l'on peut alors plus facilement conclure à l'existence d'un lien important entre le litige et le tribunal d'origine, tel qu'articulé à l'article *3164 C.c.Q.*

[56] Or, les DVDs, soit les « *thirteen copyrighted adult DVDs owned by JJV or Gasper and featuring Gasper's performances* » faisant l'objet du Litige d'origine, lequel, le Tribunal le rappelle, est relié à une violation alléguée des droits d'auteur des Requérants selon le droit américain, ont été vendus dans l'état de la Californie, et ce fait dommageable y a causé un préjudice.

[57] Il s'agit d'une application de l'article 3168(3) *C.c.Q.*, et aussi une illustration de l'existence d'un lien important, au sens de l'article *3164*

C.c.Q., entre le Litige d'origine et la Cour de district qui a rendu le Jugement Otero 2.

- **Section 34 – Copyright [civil remedies]**

A plaintiff may be liable for the costs if he withdraw his motion for interlocutory injunction.

Faas v. Coloroso, 2014 CarswellOnt 10315 (Ont. Sup. Ct.; 2014-07-29) Morgan J.

> [22] The cases where costs are awarded against a moving party for a deemed abandonment of a motion tend to be those where there was either an impropriety or the motion was ill-advised in the first place. On the other hand, costs are generally not awarded against an abandoning party where "[t]he applicants were justified in issuing the application… the materials disclosed a bona fide cause of action that was not frivolous or vexatious": *Morley v Morley*, 2013 ONSC 1595 (Master).
>
> [23] Counsel for Coloroso submits that the record here demonstrates that there was a compelling and cogent basis for bringing the injunction at the time it was brought. I agree. As indicated above, even without engaging in a full adjudication of the merits it is apparent that Coloroso had a serious copyright concern at the outset.
>
> [24] While Faas partly conceded the copyright problems at the outset of the controversy, and has been reasonable in now providing assurances to Coloroso, the dynamics of the dispute were such that the parties did not come to their temporary resolution until just last month. I do not blame either party for the duration of the controversy. Litigation is frequently a moving target for both sides. It sometimes takes time for the process to work its way through to a consensual solution, even a temporary one.
>
> [25] Coloroso's withdrawal of the motion is premised on the parties having achieved a solution that they can each live with pending trial; it will be up to the trial judge to make the ultimate decision as to whether an injunction is warranted. In my view, this is an appropriate case for the trial judge to determine the costs of the aborted interlocutory motion. That judge will also be in the best position to determine how much of the time and effort spent on the motion was useful at trial and how much was thrown away.
>
> [26] Counsel for Faas submits that if no costs are awarded to Faas under Rule 37.09(3), it was in any case reasonable to seek them

> given the case law thereunder that suggests that costs to the responding party are the rule, not the exception. I agree with that submission. Coloroso may have been justified in seeking the injunction in the first instance; but once the hard fought motion was withdrawn, Faas was justified in at least requesting costs.

- **Section 34 - Copyright [civil remedies]**

What are the connecting factors for a Canadian court to have jurisdiction.

Davydiuk v. Internet Archive Canada, 2014 CarswellNat 4162 (F.C.; 2014-10-06) McVeigh J

> [32] I find that Internet Archive did reach into Canada to the Intercan website when they requested the web pages. Whether it was automated or not does not affect my finding. The action of "following a link" or "requesting pages" as described by Internet Archive requires Internet Archive to reach out to the Canadian servers that subsequently transmit back to the United States. The request and return transmission is not done with permission or on consent. The Canadian public can access the webpage and have it transmitted back to Canada. This is exactly the evidence [the Pliantiff] Daniel Davydiuk provided the Court.

- **Section 34 - Copyright [civil remedies]**

The burden to prove the infringement lays upon the plaintiff.

Point du jour aviation ltée v. Simard, 2014 QCCQ 13560 (Que. Ct.; 2014-12-15) Chalifour J

> [6] Celui qui fait une réclamation a le fardeau de prouver, selon la prépondérance des probabilités, le bien-fondé de ses prétentions.
>
> [9] Tenant compte de la preuve contradictoire, le demandeur ne s'est pas déchargé de son fardeau de preuve.

- **Section 35 – Liability for infringement**

Copyright infringement may overide the right to privacy but the Court may intervene to ensure minimal invasion of this right.

Voltage Pictures v. Doe, 119 C.P.R. (4th) 232 (F.C.; 2014-02-20) Alto, Prothonotary

> [30] These sections of the *Copyright Act* [s. 35 and 38.1] provide a complete code for the recovery of damages for copyright infringement. Voltage argues that it has demonstrated a *bona fide* case of infringement and is entitled to pursue the alleged infringers for damages in accordance with these sections of the *Copyright Act.*
>
> [35] As noted briefly above and discussed more fully below, there are important cornpeting policy considerations as to whether the *Norwich* Order should be granted in this kind of situation. Such an order is a discretionary and extraordinary order. For the reasons discussed below, given that Voltage bas demonstrated a *bona fide* case of copyright infringement, *a Norwich* Order will be granted. This Order will be granted with qualifications intended to protect the privacy rights of individuals, and ensure that the judicial process is not being used to support a business model intended to coerce innocent individuals to make payments to avoid being sued.
>
> [45] The principles to be taken from *BMG* [*BMG Canada Inc. v. Doe,* 2005 FCA 193] are as follows:
>
> - a plaintiff must have a *bona fide* <u>*case;*</u>
> - a non-party, in this case TekSavvy, must have information on an issue in the proceeding;
> - an order of the Court is the only reasonablc means of obtaining the information;
> - that faimess requires the information be provided prior to trial; and,
> - any order made will not cause undue delay, inconvenience or expense to the thirdparty or others.
>
> [57] The enforcement of Voltage's rights as a copyright holder outweighs the privacy interests of the affected internet users. However, that is not the end of the malter. As part of making any *Norwich* Order, the Court must ensure that privacy rights are invaded in the most minimal way possible, as discussed in paras. 42 to 45 of *BMG* [*BMG Canada Inc. v. Doe,* 2005 FCA 193].

- **Section 35 – Liability for ingringement**

He who plagiarizes must pay.

Labrecque (O Sauna) v. Trudel (Centre Bellaza, s.e.n.c.), 2014 QCCQ 2595 (Que. Ct. – Small Claims; 2014-03-28) Gervais J.

> [56] On comprend de cette disposition que le législateur a voulu que celui qui ne respecte pas le droit d'autrui et s'approprie une œuvre qui n'est pas la sienne soit obligé de payer un dédommagement, notamment en versant la portion de l'avantage pécuniaire qu'il en a retiré.
>
> [57] Le résultat en est que si pour des fins commerciales un individu ou une entreprise utilise le fruit du travail d'une autre personne, il devra indemniser celle-ci à la hauteur de l'avantage que cette utilisation lui a procuré.
>
> [58] Par contre, si dans certains cas un quantum peut aisément être établi, dans d'autres l'exercice est plus ardu.

- **Section 35 - Liability for Infringement**

For an equitable set-off to be applicable the claims must be closely connected.

Poss Design Limited v. Beograd Machine & Tools Co. Ltd., 2014 CarswellOnt 6639 (Ont. Sup. Ct.; 2014-05-21) Morgan J.

> [22] Using this principle as guidance, one can readily conclude that this is not a case for equitable setoff. An unquantifiable damages claim for copyright breach or wrongful competition and marketing of goods, is not connected with – let alone "closely connected with" – the two unpaid invoices on which Beograd seeks judgment.

- **Section 38.1 – Statutory damages**

The amount of the statutory damages are within the realm of discretion of the courts. A condemnation to statutory damages could be joint and several.

Tremblay v. Plourde, [2014] J.Q. 419 (Que. Sup. Ct.; 2014-01-15) Dallaire J.

> [295] Le tribunal ne déterminant pas de condamnation à des dommages punitifs considère qu'il y a lieu de prononcer la condamnation aux dommages et intérêts solidairement entre les défendeurs.
>
> [296] En effet, il est en preuve que le défendeur est l'âme dirigeante de GTR, et ce qui bénéficie à l'un bénéficie à l'autre.

- **Section 38.1 – Statutory damages**

The proper award of statutory damages is sometime difficult to evaluate.

Tremblay v. Plourde, [2014] J.Q. 419 (Que. Sup. Ct.; 2014-01-15) Dallaire J.

> [270] Ce faisant, le défendeur s'est approprié illégalement un texte, fruit des efforts et d'un labeur élaborés sur de nombreuses années. Le tribunal arbitrera une somme de 15 000 $ pouvant comprendre que tous ces efforts lorsque copiés et dupliqués présentent à la fois un impact direct et indirect sur une usurpation de la propriété intellectuelle, ce qui est à la fois choquant en raison des efforts soutenus et vexant quant à l'effort intellectuel de conception. Cette somme comporte à la fois un montant lié au coût d'élaboration, la demanderesse ayant déterminé une valeur de 218 000 $ à ses états financiers, et un autre sur l'aspect de la violation.

- **Section 38.1 – Statutory damages**

The conduct of the parties could be taken into conisderation in the assesment of statutory damages. A condemnation to statutory damages is not a bar to punitive damages.

Trout Point Lodge Ltd. v. Handshoe, 2014 CarswellNS 110 (S.C. N.S.; 2014-02-14) Coady J.

> [26] […] I find that Mr. Handshoe's conduct towards the applicants over the past few years amounts to "outrageous and highly reprehensible" conduct. The four (4) infringements herein must be viewed on top of the defamation that continues to this date in the face of Justice Hood's injunction. This is a case for generous statutory damages as well as punitive damages.
>
> [27] I award the following statutory damages:
> - In relation to the first photograph (Ashoka), I award Charles Leary $20,000.
> - In relation to the second photograph (the Lodge), I award Mr. Perret $20,000.
> - In relation to the third photograph (Smulders), I award Trout Point Lodge Ltd. $20,000.
> - In relation to the fourth photograph, I award Trout Point Lodge Ltd. $20,000.

> [28] In addition to these statutory damages I award the applicants punitive damages of $100,000.

- **Section 38.1 – Statutory damages**

The need to deter is one of the factor to be considered. In the case of collective society, the Court has discretion to fix the approriate multiplier.

Société canadienne des auteurs compositeurs et éditeurs de musique c. 9004-1922 Québec inc. (Bar-Asserie), 2014 CarswellQue 3236 (Que. Sup. Ct.; 2014-03-31) Morrison J.

> [37] S'agit-il d'un cas où il est nécessaire de créer un effet dissuasif à l'égard de violations éventuelles du droit d'auteur?
>
> [38] Le Tribunal est d'avis qu'il est nécessaire de créer un tel effet. La défenderesse n'a pas le droit de simplement ignorer les droits d'auteurs et de plaider son incompréhension des règles applicables ou la facturation de la SOCAN.
>
> [39] La défenderesse n'est pas obligée d'être en accord avec la SOCAN, mais de simplement mettre fin à des paiements et attendre d'être poursuivie n'est pas la façon la plus appropriée pour exprimer son mécontentement.
>
> [40] Par contre, dans le présent cas, en prenant en considération les facteurs annoncés à l'art. 38.1(5) de la *LDA*, le Tribunal estime équitable d'utiliser un facteur de trois (3) fois les redevances et non pas quatre (4).

- **Section 38.1 – Statutory damages**

Exemplary damages shall not be a duplication of punitive damages.

Canada (Attorney General) v. Rundle (Nec Plus Ultra), 119 C.P.R. (4th) 225 (Ont. Sup. Ct.-Damages; 2014-04-09) James J.

> [16] While it is clear that punitive damages are available in addition to an award of statutory damages, it appears there is some overlap between clauses (a) and (b) of subsection 38.1(5) and the considerations that inform an entitlement to punitive damages. Subsection 38.1(5) specifically refers to the question of the conduct of the parties and the possibility that the infringer acted in bad faith. Punitive damages also address serious misconduct. The possibility

> of such an award becomes engaged where there are "advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own." (See *Keays v. Honda Canada Inc*., [2008] 2 S.C.R. 362 at para. 62)
>
> [17] In my view, on the specific facts of this case, including the important role of deterrence as a factor in assessing damages in copyright cases, statutory damages are sufficient without awarding an additional amount for punitive damages.
>
> [18] In considering the appropriate amount to award for damages, I note that there is no information respecting the Defendant's sales volumes or the amount of profit generated by the infringing activity. In addition, there is no clear evidence that any infringements continued after the injunction granted by R. Smith J. in 2012. Profit improperly gained through copyright infringement and deliberate defiance of court orders can be aggravating factors in assessing damages.

- **Section 38.1 – Statutory damages**

Statutory damages are an alternative to real damages. Bad faith, concealment of the activities or of defendant's identity, refusal to discontinue infringing acts, are factors to be taken into account in assessing statutoy damages.

Mitchell Repair Information Company v. Wayne Long, 2014 CarswellNat 2195, (F.C.; 2014-06-11) Annis J.

> [5] The plaintiff requests an order awarding it $20,000 in statutory damages pursuant to section 38.1 of the *Copyright Act* instead of the damages and profits otherwise claimable which are referred to in subsection 35(1).
>
> [6] In exercising its discretion to award statutory damages, the Court is required to consider all relevant factors including the good or bad faith of the defendant, the conduct of the parties before and during the proceedings and the need to deter other infringements of the copyright in question.
>
> [7] The evidence in this matter demonstrates that the defendant acted in bad faith by attempting to conceal and obfuscate his identity, including posing as a lawyer warning the plaintiff not to proceed further. In addition, the defendant refused to discontinue infringing copyright when asked and held the plaintiff in derision by taunting it

> with words to the effect that he could not be found or stopped and showing the "Jolly Roger" sign in one of his rejoinders.
>
> [8] As if this were not sufficiently outrageous and high-handed, the plaintiff's email contained derogatory invective, including the use of swearing and statements intended to be derogatory concerning the sexual orientations of the plaintiff's personnel, accompanied by pornographic materials and boasting about his unlawful conduct. For example, one email contained the following reply after being informed of his infringement: "Lol you stupid f--k I'm in canada [*sic*] I'm protected here first offence 250 dollars lol".
>
> [9] The plaintiff was only able to demonstrate one sale of the product obtained by his affidavit, but I am satisfied that many other illicit sales of the product were made by the defendant. The price differential on the average sale by the plaintiff in comparison with that by the defendant was in the order of $1,100.
>
> [10] I award the plaintiff statutory damages in the total amount of $20,000.

- **Section 38.1 – Staturory damages**

Staturory damages does not exclude punitive damages.

Mitchell Repair Information Company v. Wayne Long, 2014 CarswellNat 2195 (F.C.; 2014-06-11) Annis J.

> [14] It is noted that opting for statutory damages pursuant to section 38.1 of the *Copyright Act* does not affect any right that the copyright owner may have to an award of exemplary or punitive damages.

- **Section 38.1 – Statutory damages**

It is to the plaintiff to opt between statutory damages, and damages and profits, not to the Court.

Animal Welfare International Inc. v. W3 International Media Ltd., 2014 CarswellBC 2902 (B.C.S.C.; 2014-10-01) Ross J.

> [479] AWI submits that the damages it claims pursuant to the claim for lost profit arising from the breach of contract are also partially recoverable pursuant to the claim for breach of copyright. AWI concedes, however, that it is not entitled to double recovery. AWI submits that to a degree, some element of damages does stand separate and apart from lost sales and certain remedies may be imposed under the *CA* despite a major recovery under the head of breach of contract.
>
> [480] In the alternative, AWI submits that it can elect to claim statutory damages in lieu of ordinary damages pursuant to s. 38.1 of the *C*
>
> [486] I am satisfied that the award with respect to loss of profit made pursuant to the breach of contract compensates AWI for the profits lost due to breach of copyright. I have concluded that, given the scope of the copying and the commercial motivation of W3, it is appropriate to make an award of statutory damages which I fix at $20,000 in total.

- **Section 41.23 – Protection of separate rights**

Even in a class action, the representative must have a copyright interest.

Keatley Surveying Ltd. v. Teranet Inc., 2014 CarswellOnt 3792 (Ont. Sup. Ct. - Div. Ct; 2014-03-26) Sachs J. [add reasons 2014 CarswellOnt 9193 (Ont. Sup. Ct. - Div. Ct; 2014-06-26); reversing 107 CPR (4th) 237, (Ont. Sup. Ct.; 2012-12-14);]

> [47] As the motion judge correctly found, to qualify as a class member, a surveyor would have to own the copyright to her plan of survey. Yet, by virtue of the defences asserted (including s. 12 of the *Copyright Act*), ownership could not be determined until some of the common issues were also determined. Such a class definition is not permissible
>
> [49] I agree with the Appellant that the revised class definition is no longer merits-based. The Respondent submits that the phrase

> "whose plan of survey" implies that the class member actually owns the copyright. I disagree. To qualify as a class member, a person must either be the plan's author, the author's employer or the assignee of an author or employee. Further, the plan in question must have appeared in the Respondent's electronic database and been prepared on or before the certification date.

- **Section 41.23 - Protection of separate rights**

To be entitled to the remedies provided by the Act, the plaintiff must be the copyright owner or have a grant of interest in the copyright.

Groupe Innomax inc. v. Habitations Rouma inc., 2014 CarswellQue 4059 (Que. Sup. Ct.; 2014-04-03) Picard J.

> [11] Par ailleurs, l'article 41.23 de la Loi prévoit que le recours en violation de droit d'auteur peut être introduit par le titulaire du droit d'auteur ou par quiconque possède un droit, un titre ou un intérêt acquis par cession ou concession consentie par écrit par le titulaire. Dans ce dernier cas, le recours sera exercé dans toute l'étendue du droit, titre ou intérêt en cause.

- **Section 42 – Offences and punishment**

Even in copyright matters, sentencing must be proportionate.

R. v. Strowbridge, 2014 CarswellNfld 30 (N.L. C.A.; 2014-02-04) Hoegg J.

> [43] Federal Crown counsel argued that the trial judge employed "the step-up principle" in sentencing Mr. Strowbridge, saying that Mr. Strowbridge was initially treated leniently by the Courts with fines and probation, then was graduated to a conditional sentence before being sentenced on these charges. Counsel argued that given Mr. Strowbridge's persistence in committing financially motivated crimes, the sentencing judge in this case logically raised his sentence for his continuing criminal activity to the next level – that being a custodial sentence.
>
> [44] This argument was cogently presented and has certain merit. However, account must be taken of the marginal and unsophisticated nature of Mr. Strowbridge's offences - it is those offences for which Mr. Strowbridge is being sentenced. While it is so that the aggravating factors of Mr. Strowbridge's case weigh against a lenient

sentence for him, sight must not be lost of the facts of the offences before the Court. Mr. Strowbridge is not being sentenced for his record.

[45] When compared to the cases referred to above, it is my view that the six month custodial sentence for Mr. Strowbridge's trademark and copyright offences is disproportionality long for the gravity of the offences he committed and his level of moral blameworthiness. Accordingly, it is demonstrably unfit.

[48] Subsection 734(2) makes clear that in fining an offender, a judge is required to be satisfied that the offender has the ability to pay the fine before imposing it. In failing to apply the provisions of subsection 734(2) by assessing Mr. Strowbridge's ability to pay the $5,000 fine, and to be satisfied that Mr. Strowbridge could do so, the judge committed an error in principle. Accordingly, the $5,000 fine he imposed on Mr. Strowbridge must be quashed.

[50] The fundamental sentencing principle is proportionality. While a custodial sentence for Mr. Strowbridge's offences, given their nature and magnitude, could be disproportionate to their gravity and the level of his moral blameworthiness, the aggravating factors of Mr. Strowbridge's extensive record for "economic" type offences and the fact that he was serving a conditional sentence at the time he committed these offences, as well as the warnings he received about selling counterfeit products, make incarceration appropriate, as federal Crown counsel argued. In this regard, I note the comments by the British Columbia Court of Appeal in *R. v. Bui*, [2001] B.C.J. No. 1574, to the effect that the imposition of a second conditional sentence on a person who offends while serving a conditional sentence should be reserved for "the rarest of cases". I would not state the point quite as strongly. Nevertheless, if an offender commits an offence while serving a conditional sentence, especially an offence of similar type to the one for which he is already serving a conditional sentence, he is demonstrating, at least to some degree, that he is not able to abide by the terms of a conditional sentence, thereby suggesting that an additional conditional sentence is not appropriate. I note this was the approach taken by the Nova Scotia Court of Appeal in *R. v. Perrin*, 2012 NSCA 85 (CanLII), [2012] N.S.J. No. 443, 2012 NSCA 85, in which the court remarked that an offender who reoffends, while serving a conditional sentence would ordinarily attract a significant denunciating and deterrent sentence for the new offence.

[51] In Mr. Strowbridge's case his financial situation, especially his financial obligations which now include a new restitution order, would

> make the imposition of a fine very burdensome to him. (In this regard, I am compelled to remark that I am of the view that it is more important for him to pay restitution to his fraud victims than to pay a fine to the federal Crown.) I therefore am not satisfied, as I must be according to section 734(2) of the *Code*, that he has the ability to pay a fine. I am of the same mind as the sentencing judge in *Hu* (noted above)[*R. v. Bing Min Peter Hu*, (15 November 2008), Vancouver Docket 24383 (B.C.S.C.),], who imposed a conditional sentence on Mr. Hu due to his strained financial circumstances and the fact that he was a repeat offender. I hasten to add that I do not suggest that a custodial sentence should automatically be substituted for a fine in all cases where the offender does not have the ability to pay a fine. However, in cases where significant aggravating factors present, like in Mr. Strowbridge's case, it can be appropriate.
>
> [52] Accordingly, I would sentence Mr. Strowbridge to two months' incarceration for his trademark and copyright offences to be served consecutively to his sentences for fraud and breaches of probation.

- **Section 43.1 – Limitation or prescription period for civil remedies**

The limitation period set forth by section 43.1 only applies to copyright infringement, not to other causes of action.

Credential Securities Inc. v. QTrade Canada Inc., 2014 CarswellBC 536 (B.C. S.C.; 2014-03-03) Muir, Master

> [38] Qtrade, on the other hand, submits that the amendments raise new causes of action that would substantially expand the pleadings and change the course of the action. Qtrade submits that the new causes of action are statute barred by the provisions of the *Copyright Act*, R.S.C. 1985, c. C-42, and the *Limitation Act,* R.S.B.C. 1996 c. 266 and therefore the amendments should only be granted if just and convenient to do so
>
> [55] The *Copyright Act*, s. 43.1(1) provides for a three year limitation period from the time the plaintiff knew of the alleged breach.
>
> [56] Based on the transition provisions in s. 30 of the new *Limitation Act*, SBC 2013, c. 13, the *Limitation Act* applicable to the claims other than copyright is the former act.

> [59] What is alleged here is wrongful access and misappropriation, there is no suggestion of injury to property and the appropriate limitation period would be six years pursuant to ss. 3(5) and 3(6)(c).

- **Section 53 – Register to be evidence**

Copyright registration does not create but declares rights.

Geophysical Service Incorporated v. Canada-Nova-Scotia Offshore Petrolium Board, 2014 CarswellNat 2186 (F.C.; 2014-05-09) Annis J.

> [21] Pursuant to section 53(2) of the *Copyright Act*, RSC 1985, c C-42, GSI relies upon its certificate of registration as presumptive evidence that copyright subsists in the data and that GSI is the owner of the copyright. It acknowledges however that copyright registration does not create, but only declares the right, and that in the absence of proof to the contrary, the person registered is deemed to hold the right claimed by him. See *Grignon v Roussell*, [1991] FCJ No 557, 44 FTR 121.

- **Section 53 – Register to be evidence**

The presumptions are rebuttable.

Planification-Organisation-Publications Systèmes (POPS) Ltée v. 9054-8181 Québec Inc., 124 C.P.R. (4th) 161 (F.C.A.; 2014-07-25) Gauthier J. [varying 111 C.P.R. (4th) 1 (F.C.; 2013-04-25)]

> [68] Such a certificate of registration is evidence that the copyright subsists and that the person registered is the owner of the copyright. The presumption created by the certificate can be rebutted by credible evidence to the contrary (*Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed. (Toronto: Carswell, 2014) at page 20-6; *Hughes on Copyright & Industrial Design*, 2nd ed. (Markham: LexisNexis Canada, 2005) at pages 422 and 423).

- **Section 57 – Registration of assignment or licence**

The Federal Court may rectify a copyright registration when the information is erroneous or incomplete.

Planification-Organisation-Publications Systèmes (POPS) Ltée v. 9054-8181 Québec Inc., 124 C.P.R. (4th) 161 (F.C.A.; 2014-07-25) Gauthier J. [varying 111 C.P.R. (4th) 1 (F.C.; 2013-04-25)]

> [85] Due to the erroneous or incomplete information contained in the Epsilon certificate, it was open to the judge to strike it even if Epsilon is considered to be a compilation

- **Section 57 - Registration of assignment or licence**

To ask for the rectification of a copyright registration the plaintiff must be an interested person.

Victoria's Secret Stores Brand Management, Inc. v. Thomas Pink Limited,* 117 C.P.R. (4th) 83 (2014-01-22) Hughes J.

> [21] Having regard to the provisions of the definition of "person interested" in section 2 of the *Trade-Marks Act*, and section 53.2 and section 57 of that *Act*, I conclude:
>
> - a "person interested" must demonstrate that they are affected or "reasonably apprehend" that they will be affected by an act or omission done by another contrary to the provisions of the *Act*;
> - section 57 is specific in being directed to expungement of entries on the register such as a registration of a trade-mark;
> - section 53.2 must be broadly construed to be directed to any other act or omission done by another person, as may be contemplated by the *Act*.
>
> [28] From this jurisprudence, I conclude:
> the provisions of the Trade-Marks Act must be construed in a manner which promotes access to the *Act*;
>
> - a determination as to who is a "person interested" must be done on a case-by-case basis;
> - a "person interested" must demonstrate a reasonable apprehension that a commercial interest that it has, or may have, may be affected;
> - the threshold for determining whether a person is a "person interested" is low.

- **Section 57 – Registration of assignment or licence**

A certificate could be amended by the Court to reflect co-ownership of the copyright.

Kennedy v. Ruminski, 2014 CarswellNat 1842 (F.C.; 2014-05-30) Phelan J.

> [29] The technical libraries to the extent that they can now be identified, having been created before employment, are outside ownership in the Certificates. The technical libraries became part of the project but only by way of a free license.
>
> [30] There is no evidence that the Certificates were only to cover the technical libraries. The evidence suggests that they covered the work done after the Memorandum came into effect.
>
> [31] Therefore, the Certificates should have reflected the co-ownership of the Applicant and Respondent

- **Section 62 – Regulations**

The powers to regulate shall be within the constraints of that legislated jurisdiction. This principle apply to the Governor in Council, the Ministers and the Copyright Board.

Telus v. Canada (Attorney General), 2014 CarswellNat 1 (F.C.; 2014-01-02) Strickland J.

> [83] The Minister's authority derives from statute and the Minister can only act within the constraints of that legislated jurisdiction. In *Vaziri*, above [*Vaziri v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1159], Justice Snider quoted the following from *Greenisle Environmental Inc v Prince Edward Island*, [2005] PEIJ No 41 (QL), 2005 PESCTD 33 at para 17:
>
> > [17] it is a] fundamental principle that executive powers are granted by statute and defined and limited by statute. A statutory delegate may make a decision or rule only if authorized by statute to do so. A statutory delegate has no inherent authority…

- **Section 66.51 – Interim decisions**

Interim decisions are to avoid a legal vacuo.

Public Performance of Sound Recordings [*Re:Sound Tariff 6.B - Use of Recorded Music to Accompany Physical Activities, 2008-2012*], 2014 CarswellNat 1189 (Cop. Bd.; 2014-04-17)

> [5] As a result of the decision of the Federal Court of Appeal, Tariff 6.B is a nullity as it applies to allfitness activities except skating. Since this is an inaugural tariff, there is no earlier tariff which could continue to apply on an interim basis pursuant to paragraph 68.2(3)(b) of the Act. Re:Sound cannot collect royalties for fitness activities other than skating until the Board has complied with the order of the Federal Court of Appeal. Re:Sound may even be required to refund royalties collected to date pursuant to the tariff. The Board recognized Re:Sound's entitlement to collect some royalties in its July 6, 2012 decision.
>
> [7] The March 12, 2014 application by Re:Sound for an interim decision is granted. Those parts of Re:Sound Tariff No. 6.B (Use of Recorded Music to Accompany Physical Activities) that were set aside on February 24, 2014 in Re:Sound v Fitness Industry Council of Canada et al. (2014 FCA 48) are reinstated on an interim basis effective as of January 1, 2008 and until the Board issues a further interim decision or a final decision.

- **Section 66.51 – Interim decision**

An appeal pending before the Supreme Court of Canada is a proper reason to maintain the status quo.

Society for Reproduction Rights of Authors, Composers and Publishers in Canada v. ARTV, 2014 CarswellNat 4808 (Cop. Bd.; 2014-11-27)

> [9] SODRAC requests the interim extension of the licence agreement, which the Board had already extended once as per the interim decision of January 5, 2012, until a final decision is issued. ARTV agrees with SODRAC's request. Given that the 2008-2012 arbitration is before the Supreme Court, the parties agree once more not to proceed on the merits until a final decision is issued in this matter,

- **Section 66.52 – Variation of decision**

For this section to apply a material change should have occured. The Board has an implied jurisdiction to correct its errors.

Re: Sound v. Fitness Industry Council of Canada, 120 C.P.R. (4th) 287 (F.C.A.; 2014-02-24) Evans J.

> [86] First, the Board's express jurisdiction to vary an order under section 66.52 of the Act is exercisable only if the Board is satisfied that there has been a material change in circumstances since it rendered its decision. In my view, learning the basis of a tribunal's decision when the decision is published is not, for this purpose, a "change in circumstances since the decision was made".
>
> [87] Second, tribunals generally have implied jurisdiction to correct breaches of the duty of fairness by reopening a decision: *Posluns v. Toronto Stock Exchange*, [1968] S.C.R. 330 at 340, and, more generally, *Chandler v. Alberta Association. of Architects*, [1989] 2 S.C.R. 848; and see *Canadian Recording Industry Association v. Canada (Attorney General),* 2006 FCA 336 (Copyright Board's reconsideration cured any prior breach of the duty of procedural fairness).
>
> [88] However, even if section 66.52 is not exhaustive of the Board's power to reopen a final decision, it was not incumbent on Re:Sound in this case to request a reconsideration before applying for judicial review. Re:Sound could not have raised before the Board its other two grounds of review, namely the Board's error of law in reducing the repertoire to recordings for which the performers or makers had authorized it to act for them, and the unreasonably low royalties in *Tariff 6.B*.

- **Section 66.52 - Variation of decisions**

When its decision is rendered, the Board is functus and cannot re-open the file otherwise to correct clerical errors.

Canadian Association of Film Distributors and Exporters v. Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) Inc., 2014 CarswellNat 4094 (FCA; 2014-10-20) Noël J. [reversing *SODRAC Tariff No. 5 (2009-2012),* [2013] C.B.D. 6 (Cop. Bd.; 2013-04-26)]

> [68] The Board has the authority to reopen a prior decision pursuant to section 66.52 of the *Copyright Act* or based on the well-established case law that entitles administrative tribunals to correct slips or other types of errors committed inadvertently. In this case, the Board authorized itself to reopen the proceedings in order to correct what it itself identified as a palpable error.
>
> [69] In my opinion, the Board erred in assuming the authority to reopen the matter on this ground. The correction of a palpable error is not one of the recognized exceptions to the *functus officio* rule, nor is it a ground for redetermination under section 66.52 of the *Copyright Act*, which authorizes the Board to vary its decision to take into consideration a change in circumstances postdating the decision.
>
> [73] As acknowledged by the Board, the error it committed was not a simple clerical error, and, contrary to its assertion, its source was not "inadvertence" or "distraction" (Decision to Reopen at para. 27). Only the Board's misunderstanding of the core issue (*i.e*., the tariff structure proposed by one of the parties) can explain its error. This type of error, however palpable it may be, is not one that permits an exception to be made to the *functus officio* rule.
>
> [74] I also do not believe that the greater flexibility that administrative tribunals should be given in applying the *functus officio* rule could lead to a different outcome (*Chandler* at 861 and 862[*Chandler c. Alberta Association of Architects*, 1989] 2 R.C.S. 848]). In fact, this greater flexibility, even though it is significant, does not allow administrative tribunals to expand the recognized exceptions to the *functus officio* rule (*Metropolitan Toronto Police Services Board (Re)*, 1997 CanLII 11673 (ON IPC) at page 5; *Herzig v. Canada*, 2002 FCA 36 (CanLII) at para. 16), which is precisely what would have to be done in order to allow the Board to correct its palpable error.

- **Section 67 - Public access to repertoire**

There is a duty upon collective to provide information about its repertoire.

Re: Sound v. Fitness Industry Council of Canada, 120 C.P.R. (4th) 287 (F.C.A.; 2014-02-24) Evans J.

> [110] Third, section 67 of the Act imposes a duty on a collective society, when requested by a member of the public, to provide information about its repertoire of performers' performances and sound recordings that are in

current use. It is difficult to see how this obligation could be discharged if, as Re:Sound argues, its repertoire includes all performances and recordings eligible for equitable remuneration. While a collective society would be aware of eligible recordings and performances for which it had been authorized to act, this would not necessarily be true of the others.

[111] Fourth, it would be anomalous if a collective society were able to collect royalties for all eligible recordings used in a particular context, but distributed them only to the performers and makers of recordings in its repertoire, and to those whom it was able to discover. Re:Sound stated that it holds in a trust account the money that it had collected but could not distribute pending its identification of those who had not signed up with it. What happens to the funds owing to those that Re:Sound never identifies is unclear. In my view, Parliament should not lightly be taken to have intended to create a regime that produces such cumbersome and impractical results.

- **Section 67.1 – Filing of proposed tariffs**

Subsection 67.1(4) provides an incentive for collective societies to file a proposed tariff.

Re: Sound v. Fitness Industry Council of Canada, 120 C.P.R. (4th) 287 (F.C.A.; 2014-02-24) Evans J.

[96] In my view, the first of the Board's reasons supports its interpretation. The relevance of subsection 67.1(4) in this context is, however, less clear. The French version of the statutory text does not contain words equivalent to "with respect to the work, performer's performance or sound recording in question", which, according to the Board, support the view that Re:Sound does not necessarily collect royalties on behalf of all eligible recordings used for the purpose identified in the tariff.

[97] The French version of subsection 67.1(4) suggests a situation where a collective society has proposed no tariff at all: « Le non-dépôt du projet empêche, sauf autorisation écrite du ministre, l'exercise de quelque recours que ce soit … pour recouvrement des redevances visées à l'article 19. »

[98] On this basis, the function of subsection 67.1(4) is to provide an incentive for collective societies to file a proposed tariff in accordance with the three preceding subsections. That is, a collective society that fails in its duty to file a tariff cannot, without the written consent of the

> Minister, look to other legal proceedings to recover equitable remuneration from users of sound recordings of musical works. If this is correct, subsection 67.1(4) is of little assistance in determining for whom a collective society may collect.
>
> [99] In light of the differences in the English and French versions of the statutory text, and bearing in mind that reasonableness is the standard of review applicable to the Board's interpretation of these provisions of the Act, I am not persuaded that the Board committed an error of law in relying on subsection 67.1(4) to support its decision, especially since other provisions of the Act provide a reasonable basis for the Board's decision.

- **Section 67.1 – Filing of proposed tariffs**

Tariff must be economically realistic.

Re:Sound No. Tariff 8– Non-interactive and semi-interactive webcasts, 2009-2012, 2014 CarswellNat 1577 (Cop. Bd.; 2014-05-16)

> [114] The key advantage of per-play rates is that they are strictly correlated with usage. They are a type of transactional price. Transactional prices are used in other Internet tariffs the Board has certified, including in subsections 5(3) and (4) of the CSI Online Music Services Tariff, 2008-2010. There are thus precedents for the use of transactional pricing in a related market.
>
> [115] In this instance, we opt for a per-play tariff because it is better correlated with usage, because it monetizes music given for free, because usage is more readily and reliably measurable, because it is technologically possible and because it is a transactional price.
>
> [188] We agree with Re:Sound that minimum fees are generally required to cover the cost of issuing licences.

- **Section 67.1 – Filing of proposed tariffs**

A collective cannot file a Tariff for rights it does not administer.

Re:Sound No. Tariff 8– Non-interactive and semi-interactive webcasts, 2009-2012, 2014 CarswellNat 1577 (Cop. Bd.; 2014-05-16)

> [215] Third, Re:Sound only administers rights of public performance and the communication to the public by telecommunication for the benefit of sound recording makers and performers

- **Section 68 – Board to consider proposed tariffs and objections**

Ancillary use is to be attached to the main use.

Re:Sound No. Tariff 8– Non-interactive and semi-interactive webcasts, 2009-2012, 2014 CarswellNat 1577 (Cop. Bd.; 2014-05-16)

> [72] In our view, the Internet simulcast of a radio station's over-the-air signal is a textbook example of an ancillary use that should be dealt with at the same time as the main use. The value per listener for simulcasting and for over-the- air broadcasting is the same. That value is best achieved by attaching the ancillary use to the main one. Accordingly, the royalties should be proportional to the relative audience. [Fn 24 *Supra* note 5 [SOCAN-Re:Sound CBC Radio Tariff, 2006-2011(8 July 2011) Copyright Board Decsion] at paras. 118-120. This is in contrast with the American approach, which treats radio simulcasting as a separate product: 17 USC 114(d)(1), CFR 380.3(a)(1)]
>
> [82] We agree that portability has value. The ability to stream music over mobile devices increases the attractiveness of music streaming. This is also true of most forms of music listening. Radio sets and CD players were not always portable. Music royalty rates did not increase when portable devices emerged or when they became commonplace. Consequently, portability cannot of itself justify higher royalties.

- **Section 68 – Board to consider proposed tariffs and objections**

It is open to the parties to negotiate an agreement outside a Tariff.

Re:Sound No. Tariff 8– Non-interactive and semi-interactive webcasts, 2009-2012, 2014 CarswellNat 1577 (Cop. Bd.; 2014-05-16)

> [90] Third, we agree with the Objectors that the possible effects that any rate imbalance between interactive and other forms of webcasting may have on the market is a matter better pursued by the labels, in the free market, using the exclusive reproduction right.
>
> [103] We disagree with the Objectors about the extent of the Board's powers. At a minimum, we could encourage webcasters to apply technical measures to prevent stream ripping by offering them a

> discount.However, we will not do so in this instance, for the following reasons. First, sufficient doubts were raised about the feasibility of some measures to require further evidence before they can be imposed or encouraged. Second, there is no evidence that stream ripping is in fact a problem in Canada. Third, some reproductions of streamed content almost certainly involve "users' rights" (e.g., reproducing a stream as part of fair dealing for an allowable purpose), the exercise of which should be allowed for free. Fourth, the SRPC and other technical measures seek to protect rights which are not targeted by this tariff and which are not administered by Re:Sound; as we said in paragraph 90 above, this a matter better pursued by the labels, in the free market, using the exclusive reproduction right unless an intervention on our part becomes absolutely necessary to restore balance in the market.

- **Section 68 – Board to consider proposed tariffs and objections**

Tariffs shall be fair and equitable for all.

Re:Sound No. Tariff 8– Non-interactive and semi-interactive webcasts, 2009-2012, 2014 CarswellNat 1577 (Cop. Bd.; 2014-05-16)

> [98] To be fair and equitable, a tariff should neither overcompensate nor under compensate rights owners. If set correctly, neither a per-play rate nor a percentage-of-revenue rate will tend to do so, to the extent that each captures a (different) measure of usage. On the other hand, a tariff set at the greater of those two rates is hedged in favour of the collective. It may prevent undercompensation if a service has low revenues; it does not prevent overcompensation in the case of a high-revenue service that uses few sound recordings
>
> [99] A greater-of formulation also burdens users with an unfair share of risks. Re:Sound benefits if there are high revenues and a large number of plays, if there are high revenues and a small number of plays, and if there arelow revenues and a large number of plays. Only if there are low revenues and a small number of plays does the user benefit. By contrast, either a per-play or a percentage-of-revenue tariff, with or without a minimum fee, allocates risk between Re:Sound and the users more evenly
>
> [101] It is important not to confuse a greater-of formulation with a minimum fee or a recoupable advance. Under these scenarios, the user pays the greater of a fixed amount and the amount a formula yields. Here, Re:Sound is proposing that the user pay the largest

> amount of royalties yielded by two different formulas. The purpose of a minimum fee is to ensure that users cannot use protected sound recordings for free. The purpose of Re:Sound's proposed formula is to maximize royalties as a function of a user's business model and success

- **Section 68 – Board to consider proposed tariffs and objections**

Tariffs must be realistic.

Re:Sound No. Tariff 8– Non-interactive and semi-interactive webcasts, 2009-2012, 2014 CarswellNat 1577 (Cop. Bd.; 2014-05-16)

> [114] The key advantage of per-play rates is that they are strictly correlated with usage. They are a type of transactional price. Transactional prices are used in other Internet tariffs the Board has certified […]
>
> [115] In this instance, we opt for a per-play tariff because it is better correlated with usage, because it monetizes music given for free, because usage is more readily and reliably measurable, because it is technologically possible and because it is a transactional price.

- **Section 68 – Board to consider proposed tariffs and objections**

In any hearing to establish a Tariff evidence is required to support concerns and proposals.

Public Performance of Sound Recordings, Re [Re:Sound No. Tariff 8 – Non-interactive and semi-interactive webcasts, 2009-2012], 2014 CarswellNat 1577pdf (Cop. Bd.; 2014-05-16)

> [91] Again, Re: Sound's concerns, while not unreasonable, must be supported by evidence before we can act on them.

- **Section 68 – Board to consider proposed tariffs and objections**

Public Performance of Sound Recordings, Re [Re:Sound No. Tariff 8 – Non-interactive and semi-interactive webcasts, 2009-2012], 2014 CarswellNat 1577 (Cop. Bd.; 2014-05-16)

> [101] It is important not to confuse a greater-of formulation with a minimum fee or a recoupable advance. Under these scenarios, the user pays the greater of a fixed amount and the amount a formula yields. Here, Re:Sound is proposing that the user pay the largest amount of royalties yielded by two different formulas. The purpose of a minimum fee is to ensure that users cannot use protected sound recordings for free. The purpose of Re: Sound's proposed formula is to maximize royalties as a function of a user's business model and success.

- **Section 68 – Board to consider proposed tariffs and objections**

Public Performance of Sound Recordings, Re [Re:Sound No. Tariff 8 – Non-interactive and semi-interactive webcasts, 2009-2012], 2014 CarswellNat 1577 (Cop. Bd.; 2014-05-16)

> [113] Per-play rates are used in the United States and elsewhere [Fn31 For example, Germany, Ireland, Japan, the Netherlands, New Zealand, and the U.K: Exhibit Re: Sound-10, Exhibit 66 thereto.] for webcasting; this implies that the technology for measuring plays exists, is affordable and is available. While it may be necessary to have transitional provisions to address the difficulty of counting plays retroactively, this does not present a problem on a prospective basis.
>
> [114] The key advantage of per-play rates is that they are strictly correlated with usage. They are a type of transactional price. Transactional prices are used in other Internet tariffs the Board has certified, including in subsections 5(3) and (4) of the *CSI Online Music Services Tariff, 2008-2010*. There are thus precedents for the use of transactional pricing in a related market.
>
> [115] In this instance, we opt for a per-play tariff because it is better correlated with usage, because it monetizes music given for free, because usage is more readily and reliably measurable, because it is technologically possible and because it is a transactional price.

- **Section 68 - Board to consider proposed tariffs and objections Homologation**

Tariffs are prospective and of general application.

Public Performance of Musical Works, Re [*Statement of Royalties to Be Collected by SOCAN for the Public Performance or the Communication to the Public by*

Telecommunication, in Canada, of Musical or Dramatico-Musical Works - Tariff 4 (Concerts) 2009], 2014 CarswellNat 2802 (Cop. Bd.; 2014-07-25)

> [54] […] Prospective users who did not file a timely Objection are not official objectors. However, tariffs are prospective and of general application, in that the Board imposes obligations on absent users. Some account must therefore be taken of the interests of those who are not before us and who will be affected by our decision.

- **Section 68 – Board to consider proposed tariffs and objections**

Tariffs are of general application. Board will not render declaratory judgments.

Public Performance of Musical Works, Re [SOCAN Tariffs 22.D.1 –Audiovisual webcasts and 22.D.2 –Audiovisual user-generated content for theyears 2007 to 2013], 2014 CarswellNat 2616 (Cop. Bd. 2014-07-18) the Board

> [49] We reject most of Facebook's arguments for the following reasons. The Board has long held that when it certifies SOCAN tariffs, these are tariffs of general application. [Fn15 See, for example, Arbitration between SODRAC and CBC/Astral, November 2, 2012, at para. 63.] If Facebook does not engage in the protected acts whose price the tariff sets, it does not have to pay the tariff. Facebook would have the Board determine that it does not engage in these protected acts as a finding of fact; the Board declines to do so as this is an issue for another forum.

- **Section 68.2 – Effect of fixing royalties**

An equitable remuneration to be paid only to eligible makers and performers.

Re: Sound v. Fitness Industry Council of Canada, 120 C.P.R. (4th) 287 (F.C.A.; 2014-02-24) Evans J.

> [95] Third, subparagraph 68(2)(*a*)(i) provides that a tariff applies only in respect of performers and makers of recordings eligible for equitable remuneration under section 20. The purpose of this provision is to ensure that royalties are not collected on behalf of non-eligible recordings, not, as Re:Sound argues, that royalties must be paid in respect of all eligible recordings.
>
> [100] I do not find subparagraph 68(2)(*a*)(i) to be helpful in supporting the Board's decision. I agree with the Board that this paragraph does

> not require a collective society to collect royalties for all eligible recordings performed in public in connection with specified activities. It merely stipulates that tariffs may apply only to performers and makers of sound recordings eligible under section 20: that is, the maker of the recording was a citizen or permanent resident of Canada or a Rome Convention country at the time of the first fixation, or all the fixations done for the recording occurred in Canada or a Rome Convention country.

- **Section 68.2 – Effect of fixing royalties**

The Copyright Board is responsible for certifying the tariffs presented by the collective societes.

Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC) v. National Gallery of Canada (NGC), 121 C.P.R. (4th) 1 (S.C.C. 2014-05-14) Rothstein J. [reversing 2013 CarswellNat 507 (F.C.A.; 2013-03-04), which was reversing 2012 CarswellNat 4332 (C.A.P.P.R.T.; 2012-02-16)]

> [4] Copyrights assigned or exclusively licensed to the collective society must comply with the *Copyright Act* requirement that such assignments or exclusive licences be in writing and signed by the copyright holder or his or her agent (s. 13(4)). Collective societies may set tariffs for the use of such copyrights (ss. 70.1 and 70.13). The Copyright Board is responsible for certifying these tariffs (s. 70.15).

- **Section 70.15 - Homologation**

Tariffs must be fair and relevant.

Collective Administration in Relations of Rights Under Sections 3, 15, 18 and 2, 2014 CarswellNat 2978 (Cop. Bd.; 2014-08-08) the Board at paragraphs 22 and 25

> [22] […] Our goal is to certify a tariff that is both fair and relevant. If the tariff rate is too low and does not include the appropriate provisions, users will simply execute side agreements with CBRA [the collective society] and ignore the tariff.
>
> [25] In its decision of May 25, 2012 on Re:Sound's Tariff 5, the Board stated that it is recommended to determine if signing parties to the agreements can represent the interests of all prospective users and if comments and arguments made by former parties and non-parties have been addressed.[Fn3 Re:Sound Tariff 5.A to G (Use of Recorded Music to Accompany Live Events) 2008-2012 (25 May

> 2012) Copyright Board Decisionat para. 10] As a prospective norm of general application, a tariff imposes obligations on absent users. As such, it is important to consider the interests of absent users that will be affected by the certified tariff. According to the record, the majority of non-commercial media monitors have entered into an agreement with CBRA. They should represent the opinions of potential users.[Fn4 The 2006-2008 non-commercial media monitoring tariff was broadened to include municipal governments as potential tariff users. However, the records indicate that no municipal governments are currently users of the non-commercial tariff. Therefore, we do not think that their non-representation in the current proceedings is an issue. Media Monitoring 2006, 2007-2008(20 June 2008) Copyright Board Decisionat para. 8]

- **Section 70.13 – Filing of proposed tariffs**

Tariffs are prospective. Tariffs must take into account the interests of the parties as well as those of the users, whether they have participated or not to the hearing.

Media Monitoring 2011-2016, Re, 2014 CarswellNat 2978 (Cop. Bd.; 2014-08-02)

> [25] In its decision of May 25, 2012 on Re:Sound's Tariff 5, the Board stated that it is recommended to determine if signing parties to the agreements can represent the interests of all prospective users and if comments and arguments made by former parties and non-parties have been addressed.[Fn 3 *Re:Sound Tariff 5.A to G (Use of Recorded Music to Accompany Live Events) 2008-2012* (25 May 2012) Copyright Board *Decision* at para. 10] As a prospective norm of general application, a tariff imposes obligations on absent users. As such, it is important to consider the interests of absent users that will be affected by the certified tariff. According to the record, the majority of non-commercial media monitors have entered into an agreement with CBRA. They should represent the opinions of potential users. [Fn4 The 2006-2008 non-commercial media monitoring tariff was broadened to include municipal governments as potential tariff users. However, the records indicate that no municipal governments are currently users of the non-commercial tariff. Therefore, we do not think that their non-representation in the current proceedings is an issue. *Media Monitoring 2006, 2007-2008, Re* [2008 CarswellNat 2007 (Copyright Bd.)] (20 June 2008) Copyright Board *Decision* at para. 8.]

- **Section 70.15 – Homologation**

Tariffs are prospective and of general application.

Public Performance of Musical Works, Re [*Statement of Royalties to Be Collected by SOCAN for the Public Performance or the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works - Tariff 4 (Concerts) 2009*], 2014 CarswellNat 2802 (Cop. Bd.; 2014-07-25)

> [54] […] Prospective users who did not file a timely Objection are not official objectors. However, tariffs are prospective and of general application, in that the Board imposes obligations on absent users. Some account must therefore be taken of the interests of those who are not before us and who will be affected by our decision.

- **Section 70.15 – Homologation**

The Board has jurisdcition to impose interest on late payments.

Collective Administration in Relations of Rights Under Sections 3, 15, 18 and 2, 2014 CarswellNat 2978 (Cop. Bd.; 2014-08-08) the Board at paragraph 28;

> [28] The provinces of Alberta and Saskatchewan both objected to the provision for the interest on late payments on the grounds that it was unreasonable and/or beyond the jurisdiction of the Copyright Board. Interest on late payments provisions, essentially identical to the one in the proposed media monitoring tariffs, are common in tariffs certified by the Copyright Board. Moreover, the proposed reporting, disclosure, interest on late payments and indemnity obligations, or essentially identical provisions, have been part of the media monitoring tariffs since they were first certified in 2005.We therefore continue to certify a provision for interest for late payments in this tariff.

- **Section 70.2 – Application to fix amount of royalties, etc.**

The decisions of the Board on question of law are reviewable on the standard of correctness and those of facts on the standard of reasonableness.

Canadian Broadcasting v Sodrac 2003 Inc., 118 C.P.R. (4th) 79 (F.C.A.; 2014-03-31) Pelletier J. [application for leave to appeal to the Supreme Court of Canada filed 2014 CarswellNat 2092 (S.C.C.; 2014-05-30)]

> [27] The Board is unusual among specialized administrative tribunals in that its decisions on question of law are reviewable on the standard of correctness: see *Rogers Communications Inc. v. Society of Composers, Author sand Music Publishers of Canada,* 2012 SCC 35, [2012] 2 S.C.R. 283 at paragraphs 10-15. Questions of fact are only reviewable if they are "made in a perverse or capricious manner or without regard for the material before it [the tribunal]": see section 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. In *Canada (Citizenship and Immigration) v. Khosa,* 2009 SCC 12, [2009] 1 S.C.R. 339 (*Khosa*), the Supreme Court of Canada described this provision as providing "legislative precision to the reasonableness standard of review of factual issues falling under the *Federal Courts Act*": *Khosa*, at paragraph 46.

- **Section 73 – Certification**

Tariffs are prospective and of general application.

Public Performance of Musical Works, Re [*Statement of Royalties to Be Collected by SOCAN for the Public Performance or the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works - Tariff 4 (Concerts) 2009*], 2014 CarswellNat 2802 (Cop. Bd.; 2014-07-25)

> [54] […] Prospective users who did not file a timely Objection are not official objectors. However, tariffs are prospective and of general application, in that the Board imposes obligations on absent users. Some account must therefore be taken of the interests of those who are not before us and who will be affected by our decision.

- **Section 77 - Circumstances in which licence may be issued by Board**

Licences can be retroactive – Licences will not be for longer term than the term of copyright.

National Film Board for the synchronization and the communication to the public by telecommunication of a musical work [Non-exclusive licence issued to], 2014 CarswellNat 1775 (Cop. Bd.; 2014-05-12),

> [1] The licence authorizes the Synchronization and the communication to the public by telecommunication of a musical work entitled "L'Interplanétaire" by Les Talismans, beginning on April 1, 2013. The issuance of the licence does not release the applicant

from the obligation to obtain permission for any other use not covered by this licence.

[2] The licence expires when the work is no longer protected by copyright.

[3] The licence is non-exclusive and valid only in Canada. For other countries, it is the law of that country that applies.

- **Section 77 - Circumstances in which licence may be issued by Board**

The licence may be for paper or electronic reproduction, or both.

Nicholas for the reproduction of a painting [Non-exclusive licence issued to Jane], 2014 CarswellNat 1778 (Cop. Bd.; 2014-05-22)

[1] The licence authorizes the reproductionof apainting entitled“Comfort” by Rosalie Emslie, c. 1920s. The reproduction of the painting will be incorporated in a book entitled “The Modern Girl: Feminine Modernities, Commodities and the Body in the 1920s” by Rosalie Emslie and published by the University of Toronto Press.

No more than 500 hard-copies of the book shall be pressed. An electronic book version will also be produced. The issuance of the licence does not release the applicant from the obligation to obtain permission for any other use not covered by this licence.

- **Section 77 - Circumstances in which licence may be issued by Board**

A licence may be for the reproduction and the public execution of this reproduction.

NYM Ministries for the public performance, the reproduction and the synchronization of two musical works [Non-exclusive licence issued to], 2014 CarswellNat 2569 (Cop. Bd.; 2014-06-23)

[1] The licence authorizes the Reproduction and synchronization of two musical work sentitled Ruby, performed by the Megli Sisters and recorded at American Artists Studios (author, composer and publisher are unknown), in the event that it is protected by copyright and Child’s Request, written by William L. Carter and published by Tennessee Music. The licence also authorizes the public performance of the musical works during the workshop that is to be incorporated on a DVD.

> No more than 100 copies of the DVD shall be made.

- **Section 77 – Circumstances in which licence may be issued by the Board**

A licence could only issue for a protected work.

National Film Board of Canada, Toronto, Ontario, for the incorporation, the public performance, the reproduction and the communication to the public by telecommunication of two images [Non-exclusive licence issued to], 2014 CarswellNat 3944 (Cop. Bd. 2014-09-22)

> (1) The licence authorizes the incorporation in a documentary film entitled “My Prairie Home”, the public performance, the reproduction and the communication to the public by telecommunication of the following images, in the event that they are protected by copyright, beginning September 1, 2012:
> -A framed print of asemi-truck with lights (title and author unknown);
> -A photograph of the Calgary skyline (title and author unknown).

- **Section 79 – Definitions [Private Copying]**

CD’s are audio recording medium.

Private Copying 2015-2016, 2014 CarswellNat 5162 (Cop. Bd.; 2014-12-12)

> [26] The core issue in this decision is whether or not CDs qualify as a medium ordinarily used for private copying, pursuant to section 79 of the Act. In our opinion, they do […]

- **Section 83 - Filing of proposed tariffs**

Tariffs are prospective and of general application.

Public Performance of Musical Works, Re [*Statement of Royalties to Be Collected by SOCAN for the Public Performance or the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works - Tariff 4 (Concerts) 2009*], 2014 CarswellNat 2802 (Cop. Bd.; 2014-07-25)

> [54] […] Prospective users who did not file a timely Objection are not official objectors. However, tariffs are prospective and of general application, in that the Board imposes obligations on absent users.

> Some account must therefore be taken of the interests of those who are not before us and who will be affected by our decision.

- **Section 84 – Distribution by collecting body**

Levies must be distributed amongst three groups: authors, performers and makers.

Private Copying 2015-2016, 2014 CarswellNat 5162 (Cop. Bd.; 2014-12-12)

> [36] Section 84 of the Act requires that we apportion the levy among authors, performers and makers.

- **Section 89 – No copyright, etc., except by statute**

OPCA rides again: "Common law Copyright Notice"

Bank of Montreal v Rogozinsky, 2014 CarswellAlta 2321 (Alta Q.B.; 2014-12-16) Schlosser, Master

> [82] However, the "Common law Copyright Notice" does not merely stop with Ms. Rogozinsky's name, but also extends to her biological and physical properties (para 5) and "... absolute control and mastery over the peaceful possession of [his or her] body, mind and mental facilities ...", which, the bank is apparently interfering with by asking that the debt be repaid.
>
> [83] Other courts have been confronted with the same bizarre, inexplicable claims, for example *Gravlin et al. v Canadian Imperial Bank of Commerce et al*, at para 9; *Dempsey v Envision Credit Union*, 2006 BCSC 1324 (CanLII) 2006 Carswell BC 2142, 60 BCLR (4th) 309; *Hajdu v Ontario (Director, Family Responsibility Office)*, 2012 ONSC 1835 (CanLII) at paras 23-25; *Squamish Indian Band v Capilano Mobile Park*, 2011 BCSC 470 (CanLII) at para 62, affirmed 2012 BCCA 126 (CanLII), 318 BCAC 239. In each case the court concluded these nonsensical documents and the associated claims were entirely without merit.
>
> [84] Dennis Larry Meads, the OPCA litigant who was the subject of Associate Chief Justice Rooke's comprehensive analysis in ***Meads v Meads***, is yet another person who claimed this kind of intellectual property interest. He too also employed a copyright and trade-mark

notice that was reproduced in that decision. It and Ms. Rogozinsky's document share common passages, suggesting that these two items are related and descend from a common ancestor.

[85] *Meads* [*Meads v. Meads,* 2012 ABQB 571 (Alta. Q.B.; 2012-09-18] provides a thorough rebuttal to this entire concept: there is no such thing as a "common law" copyright or trade-mark as both property interests are the result of legislation (paras 501, 503), copyright cannot subsist in a personal name (para 502).

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